TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 146

UNITED STATES OF AMERICA, PETITIONER,

vs.

HOWARD A. McNINCH, D/B/A THE HOME COMFORT COMPANY, ROSALIE McNINCH AND GARIS P. ZEIGLER; FREDERICK L. TOEPLEMAN; AND CATO BROS., INC., WILFRED R. CATO, WILLIAM R. CATO, AND MAGIE L. DUNN (NEE: MAGIE L. STONE)

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 28, 1957

CERTIORARI GRANTED OCTOBER 14, 1957

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 146

UNITED STATES OF AMERICA, PETITIONER,

VS.

HOWARD A. McNINCH, D/B/A THE HOME COMFORT COMPANY, ROSALIE McNINCH AND GARIS P. ZEIGLER; FREDERICK L. TOEPLEMAN; AND CATO BROS., INC., WILFRED R. CATO, WILLIAM R. CATO, AND MAGIE L. DUNN (NEE: MAGIE L. STONE)

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INDEX

II

III

[fols. 1-2]

IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7224

UNITED STATES OF AMERICA, Appellant,

Versus

HOWARD A. McNINCH, d/b/a THE HOME COMFORT COMPANY, ROSALIE McNINCH AND GARIS P. ZEIGLER, Appellees

APPENDIX TO APPELLANTS' BRIEF—Filed September 10, 1956

[fol. 3] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

STATEMENT OF RELEVANT DOCKET ENTRIES

1. Summons and Complaint, filed April 14, 1955.
2. Answer of the defendant, Garis P. Zeigler, with demand for jury trial, filed May 18, 1955.
3. Notice of Motion to Dismiss Action as to Howard A. and Rosalie McNinch, filed June 2, 1955.
4. Notice of Motion to Dismiss Action as to the Defendant, Garis P. Zeigler, filed June 4, 1955.
5. Order Granting Defendant's Motion to Dismiss Action, filed February 15, 1956.
6. Notice of Appeal on behalf of the United States, filed April 13, 1956.
7. Letter from N. Welch Morrisette, Esq. in reference to appeal record, filed April 21, 1956.
8. Appeal Record to USCA on May 7, 1956, 5 pages at 40 cents per page, $2.00.

IN UNITED STATES DISTRICT COURT

COMPLAINT—Filed April 14, 1955

1. This is a civil action brought by the United States of America as plaintiff under the provisions of Sections 3490,

3492 and 5438 of the Revised Statutes (31 U. S. C. 231, 233) of which this Court has jurisdiction by virtue of the provisions of Section 3491 of the Revised Statutes (31 U. S. C. 232), as amended.

2. The defendant, Howard A. McNinch, was at all times hereinafter mentioned doing business as an individual under the name of The Home Comfort Company in the Eastern District of South Carolina, and presently resides at 208 Academy Way, Columbia, S. C., which address is within the jurisdiction of this Court.

[fol. 4] 3. The defendant, Rosalie McNinch, was at all times hereinafter mentioned employed by The Home Comfort Company as a secretary, and presently resides at 208 Academy Way, Columbia, S. C., which address is within the jurisdiction of this Court.

4. The defendant, Garis P. Zeigler, was at all times hereinafter mentioned employed by The Home Comfort Company as a salesman, and presently resides at 130 Brooklyn Circle, Columbia, S. C., which address is within the jurisdiction of this Court.

5. None of the defendants is, nor at any time mentioned herein was, a member of the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States.

6. At all times hereinafter stated the South Carolina National Bank, with offices in Columbia, S. C., was a financial institution which had qualified and been approved by the Federal Housing Administration, an agency of the United States, under Title I of the National Housing Act, as amended, and the regulations promulgated pursuant thereto, for insurance against losses sustained as the result of loans or advances of credit made for the purpose of financing home alterations, repairs and improvements.

7. The defendants at various times during the period from on or about November 6, 1951 to on or about January 10, 1953, in violation of the provisions of Sections 3490 and 5438 of the Revised Statutes, submitted to the South Carolina National Bank false, fictitious or fraudulent applications or claims, entitled "FHA Title I Credit Application (Property Improvement Loan)", for the purpose of obtaining or aiding to obtain for various homeowners with whom they had contracted to make altera-

tions, repairs or improvements, the payment or approval of loans or advances of credit with the intent that the said [fol. 5] applications or claims should be reported to and accepted by the Federal Housing Administration for insurance, which were known by the defendants to be false, fictitious or fraudulent in that they represented the applicants financial position to be favorable, whereas in fact their said status was not favorable.

8. In support of the representations contained in the said applications the defendants also submitted to the South Carolina National Bank credit reports, purportedly those of the Associated Credit Bureaus of America entitled "FHA Modernization Report ACB of A No. 10" which were false, fictitious or fraudulent and known by the defendants to be false, fictitious or fraudulent in that they likewise indicated the applicants financial position to be favorable whereas in fact their said status was unfavorable.

9. The South Carolina National Bank in reliance upon the said applications and credit reports approved the requested loans which were reported to, and accepted by, the Federal Housing Administration for insurance. The proceeds thereof were deposited to the account of The Home Comfort Company in the South Carolina National Bank. Schedule "A" attached hereto and incorporated herein by reference, reflects the names of the loan applicants in the cases in which the aforesaid false, fictitious or fraudulent claims as specified in paragraphs 7 and 8 of this complaint were filed. Said Schedule also reflects the property location, amount of credit requested, date of application, and date loans were reported to the Federal Housing Administration for insurance.

10. Defendants at various times during the period from on or about November 6, 1951, to on or about January 10, 1953, in violation of the provisions of Sections 3490 and 5438 of the Revised Statutes, agreed, combined, and con- [fol. 6] spired with each other and with divers other persons to defraud the United States, or an agency or officer thereof, by obtaining or aiding to obtain the payment or approval of false, fictitious or fraudulent claims for loans or advances of credit insured by the Federal Housing Administration.

11. Among the tricks, schemes, and devices employed by the defendants, without the knowledge of the plaintiff, in furtherance of the matters set forth in paragraphs 7, 8, 9 and 10 are:

(a) The improper procurement and use of approximately fifty blank credit report forms from the Merchants' Credit Bureau, Hartsville, South Carolina, bearing the caption "FHA Modernization Report ACB of A No. 10", and

(b) The obtainment and use of approximately two thousand counterfeit credit report forms from the Vogue Press, Columbia, S. C., bearing the captions "Associated Credit Bureaus of America," and "FHA Modernization Report ACB of A No. 10".

12. By reason of the premises and pursuant to the provisions of Sections 3490 and 5438 of the Revised Statutes, each defendant became and is liable to forfeit and pay to the United States the sum of $2,000 for each and every false claim referred to in paragraphs 7 and 9 hereof and reflected in Schedule "A" attached, and the sum of $2,000 for each of the other acts and transactions done or committed by them which constitute violations of said Statutes, together with interest and costs of this suit.

Wherefore, the United States, as the plaintiff, demands judgment against each of the defendants for the sum of $2,000 for each and every one of the foregoing false, fictitious or fraudulent claims made or caused to be made, presented or caused to be presented by defendants upon the [fol. 7] United States for payment or approval, and for each of the other acts done or committed by the defendants which constitute a violation of Sections 3490 and 5438 of the Revised Statutes, together with interest and costs of this action.

United States Attorney.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed May 18, 1955

The defendant Garis P. Zeigler, answering the complaint herein would respectfully show:

1. The complaint fails to state a claim against the defendant upon which relief can be granted.

2. Answering paragraph 1 this defendant admits that the action is brought under the statutes therein designated, but denies that plaintiff is entitled to any relief thereunder.

3. The allegations of paragraphs 2, 3, 4, 5, and 6 of the complaint are admitted.

4. The allegations of paragraphs 7, 8, 9, 10, 11, and 12 are denied, and except as herein specifically admitted this defendant denies each and every allegation in said complaint contained.

Wherefore, having fully answered the defendant Garis P. Zeigler prays that the complaint be dismissed with costs, and for such other and further relief as may be just and proper.

Nelson, Mullins & Grier, (S.) P. H. Nelson, Attorneys for Defendant Garis P. Zeigler. Address: 902 Palmetto Building, Columbia, S. C.

Columbia, S. C., May 5, 1955.

Jury trial demanded.

[fol. 8] IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION—Filed June 2, 1955

To Honorable N. Welch Morrisette, Jr., United States Attorney.

Please take notice that on the fifth day after service hereof, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, before the Honorable George Bell Timmerman, United States District Judge, at chambers, United States Courthouse, Columbia, South Carolina, the undersigned attorney for the defendants, Howard A.

McNinch, d/b/a The Home Comfort Company and Rosali McNinch, will apply for an Order dismissing this action because the Complaint fails to state a claim against either of the said defendants upon which relief can be granted.

(S). A. Fletcher Spigner, Jr., Attorney for the Defendants Howard A. McNinch, d/b/a The Home Comfort Company and Rosalie McNinch.

Columbia, S. C., May 26, 1955.

IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION—Filed June 4, 1955

To Honorable N. Welch Morrisette, Jr., United States Attorney:

You will please take notice that on the fifth day after service hereof, at ten o'clock a. m., or as soon thereafter as counsel may be heard, the defendant, Garis P. Zeigler, through his undersigned attorney, will move before the Honorable George Bell Timmerman, United States District Judge, at his Chambers at the Federal Court House in Columbia, South Carolina, for an Order dismissing this action on the ground that the Complaint fails to state a [fol. 9] claim against said defendant upon which relief can be granted.

P. H. Nelson, Attorney for the defendant, Garis P. Zeigler. Address: 902 Palmetto Building, Columbia, S. C.

Columbia, S. C., June 3, 1955.

IN UNITED STATES DISTRICT COURT

ORDER—February 15, 1956

I have for consideration defendants' motions to dismiss this action. The motion of Howard A. McNinch and Rosalie McNinch and the motion of Garis P. Zeigler are both made upon the same ground, that the complaint fails to

state a claim against the defendants for which relief can be granted.

The complaint alleges substantially the following facts: The defendant Howard A. McNinch operated a business known as The Home Comfort Company which had for its purpose the alteration, repair and improvement of homes. The defendant Rosalie McNinch was secretary of the business, and the defendant Garis P. Zeigler was employed as a salesman. At various times during the period from November, 1951, through January, 1953, the defendants submitted to the South Carolina National Bank, an institution approved by the Federal Housing Administration for insurance against losses sustained from the lending of money for home improvements, fraudulent FHA loan applications and credit reports pertaining to the financial condition of customers of The Home Comfort Company, and conspired thereby among themselves and their customers to defraud the United States by obtaining the approval of false and fictitious applications for loans insured by the Federal Housing Administration.

[fol. 10] This action is brought under Sections 231 and 233 of Title 31, United States Code. The pertinent part of Section 231 reads as follows:

> "Any person * * * who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, * * * shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the

amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

It seems to me that the quoted part of Section 231 states three general categories under one or more of which an action must fall before it can be sustained thereunder. To come within the first category, it must appear from the complaint that the defendants made or caused to be made, or presented or cause to be presented, to a person or officer in the service of the United States a claim against the [fol. 11] United States or some department thereof knowing such claim to be false, fictitious, or fraudulent. There is no allegation in the instant complaint that any such claim, false or otherwise, was ever made or presented to any department or officer of the United States by the defendants or anyone else.

To meet the conditions of the second category, it should be alleged in the complaint that the defendants, for the purpose of obtaining or aiding in obtaining the payment or approval of *such a claim*, made, used or caused to be made or used, a false bill, receipt, claim or other designated paper, knowing the same to be false or fictitious in some respect or respects. The instant complaint does not allege the existence of "such a claim," that is, "any claim upon or against the Government of the United States, or any department or officer thereof," for it is not contended that any such claim has ever been made or presented to or paid by the plaintiff or any department or officer of plaintiff.

To come within the third category, the complaint should allege that defendants entered into an agreement or conspiracy to defraud the United States or some department or officer thereof by obtaining or aiding in obtaining payment or allowance of a false or fraudulent claim. There is no contention in this case that the Government or any department or officer thereof has allowed, approved, or paid any "such claim."

The gist of the Government's contention in this case, as stated in its brief, is "that when a person presents a *credit application* known to be false to an FHA-approved

lending institution for the purpose of obtaining a loan, as intended by the applicant, and the loan is insured by the FHA, the *False Claims Act* is violated even though *there* [fol. 12] *there is no default* in the loan." [Emphasis Added.]

It may be that the statute should provide a penalty for what is here complained about, but it is quite obvious that it does not do so, maybe cause when the Act was enacted in 1863, the Congress did not think in terms of the situation with which we are now concerned in 1956.

It seems evident that, if the statute is made to apply here, it will be after the Court has effected some very drastic amendments to the Act (a procedure not now novel in some courts), such as holding that *a credit application* directed to a bank is the same as a "claim upon or against the Government of the United States, or any department or officer thereof," the bank, of course, being regarded as the Government or a department thereof. I do not feel that I have the authority or competency to exercise such legislative power since by the Constitution all legislative power has been vested in the Congress of the United States.

In point here is the case of *United States* v. *Martin Tieger*, in the United States District Court for the District of New Jersey. The opinion by Judge Smith was filed November 18, 1954, but was never published. The facts there are on all fours with those here, except for names, dates, amounts, etc. Even, as here, the loans were all paid and no one suffered a loss. There as here it was argued, "that the *presentation of the false and fraudulent loan applications was tantamount to the presentation of claims upon or against the Government of the United States or an agency thereof.*" [Emphasis added.] Commenting on this argument, Judge Smith said: "We are of the opinion that the argument is without merit. The term 'claim,' in its common acceptance, denotes a demand for money or [fols. 13-22] property as of right. Accord, *Hobbs* v. *McLean*, 117 U.S. 567, 575; *Milliken* v. *Barrow*, 65 Fed. 888, 894; *United States* v. *Byron*, 223 Fed. 789, 800. There is no allegation that any such demands were ever made upon the United States or any agency thereof; in fact, the repayment of the loans preclude any such demands." I find

myself in accord with the views expressed by Judge Smith in the cited *Tieger* case.

It appearing to me that the complaint fails to state a claim for which relief can be granted, defendants' motions to dismiss the action should be granted. Accordingly, it is so.

Ordered.

This 15th day of February, 1956.

(S.) George Bell Timmerman, United States District Judge.

[fol. 23] IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7224

UNITED STATES OF AMERICA, Appellant,

versus

HOWARD A. McNINCH, d/b/a THE HOME COMFORT COMPANY, ROSALIE McNINCH and GARIS P. ZEIGLER, Appellees

Appeal from the United States District Court for the Eastern District of South Carolina, at Columbia

DOCKET ENTRIES

May 8, 1956, record on appeal filed and appeal docketed.

May 8, 1956, appearance of Melvin Richter and William W. Ross, Attorneys, Department of Justice, entered for the appellant.

May 11, 1956, appearance of N. Welch Morrisette, Jr., United States Attorney, entered for the appellant.

May 11, 1956, appearance of Edwin P. Gardner entered for the appellees.

August 22, 1956, appearance of P. H. Nelson and E. W. Mullins entered for the appellees.

September 10, 1956, brief and appendix for appellant filed.

September 26, 1956, brief and appendix for appellees filed.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—October 4, 1956 (Omitted in printing)

[fol. 24] IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ORDER DEFERRING DECISION UNTIL FINAL ACTION OF THE SUPREME COURT IN UNITED STATES v. MARTIN TIEGER AND UNITED STATES v. HARVEY COCHRAN—Filed and Entered October 11, 1956

In the above entitled case it appearing that the questions involved have been presented to the Supreme Court of the United States in petitions for certiorari to review the case of United States v. Martin Tieger, 3 Cir. 234 F. 2d 589, and United States v. Harvey Cochran, 5 Cir. 235 F. 2d 131:

It is ordered that the decision in this case be deferred until the Supreme Court has acted upon said petitions for certiorari; and if certiorari is granted, until the decision of the Supreme Court in these cases.

John J. Parker, Chief Judge, Fourth Circuit.

[fol. 25] IN UNITED STATES COURT OF APPEALS FOR THE Fourth Circuit

No. 7224

UNITED STATES OF AMERICA, Appellant,

versus

HOWARD A. McNINCH, d/b/a THE HOME COMFORT COMPANY, ROSALIE McNINCH and GARIS P. ZEIGLER, Appellees

Appeal from the United States District Court for the Eastern District of South Carolina, at Columbia

Argued October 4, 1956

No. 7321

FREDERICK L. TOEPLEMAN, Appellant and Cross-Appellee,

versus

UNITED STATES OF AMERICA, Appellee and Cross-Appellant

[fol. 26] Cross-Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh

No. 7333

CATO BROS., INCORPORATED, WILFRED R. CATO, WILLIAM R. CATO, and Magie L. Dunn (nee: Magie L. Stone), Appellants,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond

Argued January 14, 1957

Before PARKER, Chief Judge, SOPER, Circuit Judge, and BRYAN, *District Judge*

No. 7224. William W. Ross, Attorney, Department of Justice, (George Cochran Doub, Assistant Attorney Gen-

eral; N. Welch Morrisette, Jr., United States Attorney, and Melvin Richter, Attorney, Department of Justice, on brief) for Appellant, and E. W. Mullins and Edwin P. [fol. 27] Gardner (Nelson, Mullins & Grier on brief) for Appellees.

No. 7321. B. S. Royster, Jr., (Frank W. Hancock, Jr., on brief) for Appellant and Cross-Appellee, and William W. Ross, Attorney, Department of Justice, (George Cochran Doub, Assistant Attorney, General; Julian T. Gaskill, United States Attorney, and Melvin Richter, Attorney, Department of Justice, on brief) for Appellee and Cross-Appellant.

No. 7333. Charles W. Laughlin and A. C. Epps (Christian, Barton, Parker & Boyd on brief) for Appellants, and William W. Ross, Attorney, Department of Justice, (George Cochran Doub, Assistant Attorney General; Lester S. Parsons, Jr., United States Attorney, and Melvin Richter, Attorney, Department of Justice, on brief) for Appellee.

OPINION—Decided February 28, 1957

PARKER, Chief Judge:

These are appeals from judgments in actions instituted under the Federal False Claims Act, R.S. 3490, 5438, 31 USC 231. In No. 7224 the action was grounded on false representations made in obtaining the guaranty by the Federal Housing Administration of loans made to defendants by a bank. Judgment was entered for defendants and the United States has appealed. See *United States* v. *McNinch* 138 F. Supp. 711. In the other two cases, action was grounded on false representations made to the Commodity Credit Corporation for the purpose of obtaining loans on cotton. Judgment was entered in favor of the United States for the $2,0000 forfeiture provided by statute as to [fol. 28] a number of transactions and the defendants have appealed. The cases are considered together, as the controlling question in all of them is the applicability of the False Claims Act to claims against government corporations as distinguished from claims against the government itself or "any department or officer thereof."

In No. 7224 the facts are that two of the defendants were officers and one a salesman of an unincorporated home construction business. They presented to a bank, which was an approved FHA lending institution, eleven fraudulent FHA loan applications for the purpose of obtaining FHA-insured home improvement loans in behalf of home-owner customers with whom they had contracted to carry out home improvements. The bank made the loans, which were then insured by the FHA pursuant to Title I of the National Housing Act. Prior to the institution of this proceeding, two of the defendants pleaded guilty to violating 18 USC 1010, which prohibits the making of false statements for the purpose of obtaining FHA-insured loans.

In No. 7321 the facts are that defendants were engaged in the cotton business. Desiring to obtain non-recourse loans on cotton which they purchased in the course of their business, they caused eighty-two producers' notes and loan agreements to be signed by producers of cotton and used them to obtain loans under the Cotton Loan Program from the Commodity Credit Corporation, pledging as security cotton belonging, not to the producers who signed the notes, but to the defendants. The holding of the court was that each note constituted a false claim under the statute and judgment was entered against the defendant Toepleman for the sum of $2,000 as to each note, or a total of $164,000, subject to a credit of $2,000. Defendant Toepelman paid [fol. 29] 39 of the notes and redeemed the cotton thereunder. The remaining 43 notes were not paid on maturity and the cotton pledged to secure same was sold by the government at a loss of $6,733.97. Toepleman appealed from the judgment for $162,000 and the United States filed a cross appeal from the refusal of the judge to render judgment for double the amount of the $6,733.97 loss sustained on the sale of the cotton.

In No. 7333, the facts are that the defendants obtained loans on cotton from the Commodity Credit Corporation in 30 separate transactions embracing notes which contained the false representation that they were made by the producers of the cotton. Judgment was rendered against the defendants for $60,000, representing a forfeiture of $2,000 as to each transaction; and from this portion of the judgment defendants have appealed. Judgment was ren-

dered in favor of defendants for $1,150.24 on a counter-claim relating to an entirely different matter, and from this portion of the judgment no appeal was taken.

The important question presented by all of the appeals is whether the forfeiture of $2,000 imposed by the False Claims Act applies where the claims are made, not directly against the government or against "any department or officer" of the government, but against a corporation as a governmental agency. We think that, in the light of the language used in the statute, as well as in the light of legislative history, this question must be answered in the negative.

The authoritative text of the False Claims Act is to be found in Section 3490 of the Revised Statutes of 1878, which is as follows:

> [fol. 30] "Sec. 3490—Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the services of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title 'Crimes', shall forfeit and pay to the United States the sum of Two Thousand Dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

This section has never been amended, although R.S. 5438 has been amended. Prior to the amendment of R.S. 5438, the pertinent portion of that section, incorporated by reference in R.S. 3490, was as follows:

> "Sec. 5438—Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval services of the United States, any claim *upon or against the Government of the United States, or any department or officer thereof*, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of *such claim*, makes, uses or causes to be made or used, any false bill, receipt,

voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the *Government of the United States or any department or officer thereof, by obtaining or aiding to obtain the* [fol. 31] *payment or allowance of any false or fraudulent claim,* * * * shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars." (Italics supplied).

In 1918, section 5438, then appearing as section 35 of the Criminal Code, was amended by adding to the list of those to whom it was made criminal to present a false claim "any corporation in which the United States of America is a stockholder". Like language was added to the description of the claim. 40 Stat. 1015. The purpose of the amendment was to extend the criminal provision of the section so as to protect government corporations, i.e. corporation in which the government was a stockholder and in reality the owner of the corporate business and property. See *United States* v. *Bowman* 260 U.S. 94 and H.R. Report No. 668, 65th Cong. 2d Sess. and 56 Cong. Rec. pp. 11, 118-11, 119. The section as amended was carried forward and reenacted as section 287 of Title 18 of the United States Code, making it a crime to present a false claim against "The United States, or any department or *agency* thereof." (Italics supplied). This language, of course, makes the criminal statute applicable to false claims against government corporations, since "agency" is defined in 18 USC 6 as including "any corporation in which the United States has a proprietary interest."

There has been no amendment of the civil provisions contained in R.S. 3490, extending their coverage to false claims against government corporation; and it is well settled that the incorporation of the terms of a statute by reference does not incorporate subsequent amendments of that statute. See *Kendall* v. *United States* 12 Peters 524, [fol. 32] 625; *In re Heath* 144 U.S. 92; *Hassett* v. *Welch* 303 U.S. 303, 314. This has been held expressly with respect to the incorporation by R.S. 3490 of the provisions of R.S. 5438. *United States ex rel. Kessler* v. *Mercur Corporation* 2 Cir. 83 F. 2d 178, 180, cert. den. 299 U.S. 576.

In the case cited, the Court of Appeals of the Second Circuit, speaking through Judge Augustus N. Hand, said:

> "While section 5438 was amended, repealed, and finally since the time when it was referred to in section 3490 superseded by a broader enactment (18 USCA 80), it stands, so far as section 3490 is concerned, as it was written when incorporated by reference. It is quite immaterial that the superseding act alone appears in the United States Code, for the Code only embodies a prima facie statement of the statutory law. It is well settled that where a statute incorporates another, and the one incorporated is thereafter amended or repealed, the scope of the incorporating statute remains intact and 'no subsequent legislation has ever been supposed to affect it.' Kendall v. United States, 12 Pet. 524, 625, 9 L. Ed. 1181; In re Heath, 144 U.S. 92, 93, 94, 12 S. Ct. 615, 36 L. Ed. 358."

See also *United States* v. *McMurty* (W.D.Ky.) 5 F. Supp. 515, and *Olson* v. *Mellon* (W.D.Pa.) 4 F. Supp. 947, adopted as opinion of Court of Appeals of Third Circuit 71 F. 2d 1021.

The question, then, is narrowed to this: Is a claim against a government corporation, which acts as an agency of the government, a claim against the government of the United States or a department or officer thereof as required by R.S. 5438 as a condition of liability at the time of the adoption [fol. 33] of R.S. 3490? The answer is manifestly that it is not such a claim. A government corporation, even though acting as an agency of the government is not the government, nor is it a department or officer of the government. As said by Judge Patterson in *United States ex rel. Meyer Salzman* v. *Salant & Salant* 41 F. Supp. 196, 197: "a corporation which is an agency of the government is not the government or a department or officer of it". See also *Pierce* v. *United States* 314 U.S. 306 and *Lindgren* v. *United States Shipping Board Merchant Fleet Corporation* 55 F. 2d 117, 120, cert. den. 286 U.S. 542. In the case last cited this court said:

> "Plaintiff contends, however, that this suit and the former suit are virtually against the same defendant because the United States owns the stock of the Fleet Corporation and the Fleet Corporation is an agency

of the United States. This position cannot be sustained. The United States is a sovereign power representing in its corporate capacity the people of the country and immune from suit, except as it may give its consent thereto. The Fleet Corporation is a private corporation of the District of Columbia, created under the laws of the United States, with power to sue and be sued in the same manner as other corporations. Sloan Shipyards Corp. v. U. S. Shipping Board Emergency Fleet Corporation, 258 U.S. 549, 568, 42 S. St. 386, 66 L. Ed. 762; U. S. Shipping Board Merchant Fleet Corporation v. Harwood, 281 U.S. 519, 526, 50 S. Ct. 372, 74 L. Ed. 1011. Although the United States owns its stock, it is a distinct entity just as other corporations are distinct from their stockholders. A suit against it is not a suit against the United States, and a suit against the United States is not a suit against it."

[fol. 34] There is nothing to the contrary in *United States ex rel. Marcus* v. *Hess* 317 U.S. 537. The fraud there was perpetrated not against a government corporation but against the government itself, the decision being that R.S. 5438 covered the case of one who knowingly caused the government to pay claims grounded in fraud. The gist of the decision is contained in the following quotation, viz.:

"While payment itself, in the sense of the direct transferring of checks, was done in the name of local authorities, monthly estimates for payment were submitted by the respondents to the local sponsors on P.W.A. forms which showed the government's participation in the work and called attention to other federal statutes prohibiting fraudulent claims. It was a prerequisite to respondents' payment by the local sponsors that these estimates be filed, transmitted to, and approved by, the P.W.A. authorities. *Payment was then made from a joint construction bank account containing both federal and local funds.* The work was done under constant federal supervision.

"*The government's money* would never have been placed in the joint fund for payment to respondents had its agents known the bids were collusive. By their conduct, the respondents thus caused *the government to pay* claims of the local sponsors in order that they

> might in turn pay respondents under contracts found to have been executed as the result of the fradulent bidding. This fraud did not spend itself with the execution of the contract. Its taint entered into every swollen estimate which was the basic cause for payment of every dollar paid by the P.W.A. into the joint fund for the benefit of respondents. The initial fraud- [fol. 35] ulent action and every step thereafter taken pressed ever to the ultimate goal—payment of government money to persons who had caused it to be defrauded." (Italics supplied).

The fact that the government corporations here involved were not in existence at the time of the enactment of R.S. 5438 would not be controlling if the language of the section were broad enough to encompass claims against such corporations; but, as we have seen, the language is not broad enough to cover such claims, however liberal an interpretation be placed upon it. And in this connection we are bound to give consideration to the fact that the language of R.S. 3490 was not amended to cover such claims when amendments were made in the language of R.S. 5438 to cover the making of fraudulent claims against government corporations. Not only is this true, but it is true also that, in subsequent legislation passed to protect government corporations against false and fraudulent claims, criminal penalties were specifically provided but no provision was made for civil penalties or forfeitures. See 18 USC 1010 and 1014. If it were the intent of Congress that presentation of false claims against such corporations be redressed by actions for civil penalties or forfeitures, it would have been easy enough to have so provided when the statutes were enacted providing the criminal penalties.* Such action by Congress would certainly be more logical

---

* In such case, civil penalties would properly have been made recoverable by the corporation, not by the United States. The fact that the forfeiture under R.S. 3490 must be recovered in a suit by the United States, and not by the government corporation to which the false claim has been presented, is an additional argument that false claims against such corporations are not comprehended by the statute.

and seemly than for the courts to give a forced interpreta-
[fol. 36] tion to a statute passed three quarters of a century ago when government corporations had not been dreamed of.

Another ground for holding the statute not applicable in case No. 7224 is that the obtaining of the guaranty of loan was not the making of a claim within the meaning of the statute. *United States* v. *Tieger* 3 Cir. 234 F 2d 589, cert. den. 352 U.S. 941; *United States* v. *Cochran* 5 Cir. 275 F. 2d 131, cert. den. 352 U.S. 941.

For the reasons stated, the decision in No. 7224 will be affirmed, the decision in No. 732 will be reversed in so far as it gives judgment against defendants and affirmed in so far as it denies recovery of damages under the statute, and the decision in No. 7333 will be reversed in so far as it gives judgment against defendants.

No. 7224, Affirmed.

No. 7321, Reversed in Part and Affirmed in Part.

No. 7333, Reversed in Part.

[fol. 37] IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7224.

UNITED STATES OF AMERICA, Appellant,

vs.

HOWARD A. MCNINCH, d/b/a THE HOME COMFORT COMPANY, ROSALIE MCNINCH and GARIS P. ZEIGLER, Appellees.

Appeal from the United States District Court for the Eastern District of South Carolina

JUDGEMENT—Filed and Entered February 28, 1957.

This cause came on to be heard on the record from the United States District Court for the Eastern District of South Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

John J. Parker, Chief Judge, Fourth Circuit.
Morris A. Soper, United States Circuit Judge.
Albert V. Bryan, United States District Judge.

April 2, 1957, mandate issued and transmitted to the Clerk of the United States District Court at Charleston, South Carolina.

April 2, 1957, record on appeal returned to Clerk of the United States District Court at Charleston, South Carolina.

[fol. 38] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 39] IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7321

FREDRICK L. TOEPLEMAN, Appellant,

versus

UNITED STATES OF AMERICA, Appellee,

and

UNITED STATES OF AMERICA, Appellant,

versus

FREDERICK L. TOEPLEMAN and GARLAND GREENWAY, Appellees

Appendix to Brief of Frederick L. Toepleman, Appellant —Filed January 2, 1957

[fol. 40] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, RALEIGH DIVISION

CIVIL NO. 822

UNITED STATES OF AMERICA, Plaintiff,

vs.

FREDERICK L. TOEPLEMAN, AND GARLAND GREENWAY, as Individuals; Frederick L. Toepleman and Garland Greenway Partners, d-b-a Garland Greenway; Walter B. Moseley; A. E. Henderson; First Citizens Bank and Trust Company, Louisburg, North Carolina, Defendants.

COMPLAINT

1. This is a civil action brought by the United States of America as plaintiff under the provisions of Section 3490

through 3492, and Section 5438 of the Revised Statutes (31 U.S.C. 231-233) of which this Court has jurisdiction under Section 3491 of the Revised Statutes, as amended (31 U.S.C. 232).

2. The defendants, Frederick L. Toepleman and Garland Greenway, are residents of Henderson, Vance County, North Carolina, within the jurisdiction of this Court.

3. The defendants, Frederick L. Toepleman and Garland Greenway, do business as partners under the partnership name of Garland Greenway at Henderson, Vance County, North Carolina within the jurisdiction of this Court.

4. The defendant, Walter B. Moseley, is a resident of Broadnax, Virgina.

[fol. 41] 5. The defendant, A. E. Henderson, is a resident of Louisburg, Franklin County, North Carolina, within the jurisdiction of this Court, and was at all times mentioned herein Cashier of the First Citizens Bank and Trust Company, Louisburg, North Carolina, authorized to process loans to cotton producers by the said bank under the 1948 Cotton Loan Program.

6. The defendant, First Citizens Bank and Trust Company, Louisburg, North Carolina, is a state banking association, duly organized and existing according to law, and is a resident of and is found in Louisburg, North Carolina, within the jurisdiction of this Court. During the period involved in this action, the First Citizens Bank and Trust Company was an "Approved Lending Agency" of Commodity Credit Corporation pursuant to the terms of a "Lending Agency Agreement" entered into by the said bank and the said Corporation, more fully described hereinafter.

7. None of the defendants is, nor at any time mentioned herein was, in the military or naval forces of the United States or in the militia called into or actually employed in the service of the United States.

8. Commodity Credit Corporation (hereinafter referred to as CCC) is an agency and instrumentality of the United States, the plaintiff herein, and all the officers and employees of CCC are, and were at all times mentioned herein, persons in the Civil Service of the United States.

9. On July 23, 1948, CCC issued its 1948 Cotton Loan Instructions (13. F.R. 4338), a true and correct copy of which is annexed hereto, as a part hereof, marked "A",

announcing a 1948 Cotton Loan Program under which loans would be made available to producers upon 1948 crop cotton which they had produced, as authorized and directed by Section 8 of the Stabilization Act of 1942, as amended (56 Stat. 767; 50 U.S.C., App. 968) and the CCC Charter Act (62 Stat. 1070; 15 U.S.C. 714).

[fol. 42] 10. Said 1948 Cotton Loan Instructions provided that loans on eligible cotton would be made available to eligible producers, defined an eligible producer as any person producing cotton in 1948 in the capacity of landowner, landlord, tenant, or sharecropper, and defined eligible cotton as cotton which, among other requirements, had been produced by the person tendering it for a loan and which such person had a legal right to pledge as security for a loan. Said Instructions required a producer obtaining a loan on cotton to tender a duly executed 1948 Cotton Producer's Note and Loan Agreement (hereinafter referred to as a "Note"), a true and correct copy of a form of which is annexed hereto, as a part hereof, marked "B", listing the warehouse receipt numbers and description of the cotton and pledging the warehouse receipts representing the cotton as security for the loan.

11. On August 3, 1948, CCC and defendant First Citizens Bank and Trust Company entered into a Lending Agency Agreement, a true and correct copy of the blank form of which is annexed hereto as a part hereof marked "C", under which defendant First Citizens Bank and Trust Company was authorized to make loans to producers of 1948 crop cotton in accordance with the provisions thereof and said 1948 Cotton Loan Instructions upon tender by the producers of duly executed Notes and warehouse receipts representing the cotton. Said Lending Agency Agreement further provided that the date on each Note must be the date on which defendant First Citizens Bank and Trust Company made disbursement of the loan proceeds to the producer; that said defendant should not make a loan on cotton pursuant to said agreement, if to said defendant's knowledge, the cotton tendered by the producer was ineligible for a loan under the 1948 Cotton Loan Instructions; and that said defendant must tender all Notes evidencing loans made in accordance with said agreement to CCC and that CCC would pay said bank the face value of the [fol. 43] notes plus interest therein at the rate of 1½ per

cent per annum from the date of such Notes to the date of payment by the CCC. The Lending Agency Agreement entered into by the CCC and the First Citizens Bank and Trust Company was executed on behalf of the Bank by defendant, A. E. Henderson, Cashier.

12. During 1948 the defendants did enter into an agreement, combination or conspiracy, and did agree, combine, and conspire to defraud the Government of the United States, or a department or officer thereof, by obtaining or aiding to obtain the payment or allowance of false and fraudulent claims under said 1948 Cotton Loan Program as herein set forth, to plaintiff's damages.

13. During the 1948 cotton marketing season the defendant Frederick L. Toepleman and Garland Greenway doing business as a partnership under the name of Garland Greenway, purchased at least 325 bales of cotton from various producers and other persons including defendant, Walter B. Moseley. The defendants, Toepleman and Greenway, induced various producers and other persons including Moseley to execute 82 Notes, many of which were executed in blank. These Notes were used to obtain loans from CCC on cotton which had been purchased by Toepleman and Greenway, and which was therefore ineligible.

14. Following the sale of 168 bales of cotton to Toepleman and Greenway by Walter B. Moseley, Moseley furnished Toepleman and Greenway, at their request 41 of the 82 Notes mentioned in paragraph 13, including some falsely executed by him as producer, and some executed in blank by the producers, for the purpose of enabling Toepleman and Greenway to obtain loans on the cotton under the 1948 Cotton Loan Program. Toepleman and Greenway did obtain said loans, and Moseley thus caused to be made or caused to be presented for payment or approval to [fol. 44] persons or officers in the Civil Service of the United States, 41 claims upon or against the Government of the United States, or a Department or officer thereof knowing such claims to be false, fictitious or fraudulent to plaintiff's damage.

15. Defendants, Toepleman and Greenway, listed or caused to be listed on the 82 Notes referred to in paragraph 13 hereof, the warehouse receipt numbers and descriptions of the 325 bales of cotton purchased by said defendants during the 1948 marketing season, and presented such

Notes, or caused such Notes to be presented, to CCC and requested payment thereof.

16. Each of the 82 Notes contained the representations and warranty that the person executing the Note had produced the cotton listed on the Note; that he had the legal right to pledge the cotton as collateral security for the loan; that the benefits of the loan evidenced by the Note would accrue solely to the producer and any tenants or sharecroppers having an interest in the cotton or its proceeds; that the benefits of the loan had not been transferred to any other party by way of assignment, sale, or option; and that he was eligible for a loan on the cotton under said 1948 Cotton Loan Instructions; whereas in fact said representations, warranties, entries and certifications were false, fictitious and fraudulent and known to be false, fictitious, and fraudulent by all of the defendants.

17. Of the 82 Notes referred to in paragraph 13 hereof, 9 Notes were submitted to CCC by the defendant First Citizens Bank and Trust Company, as Notes evidencing loans made by said Bank pursuant to the Lending Agency Agreement referred to in paragraph 11 hereof. The defendants, First Citizens Bank and Trust Company and A. E. Henderson, falsely certified on each of the said 9 Notes submitted to CCC by the First Citizens Bank and Trust Company as Lending Agency, that they believed that the cotton listed on each Note was "eligible cotton" as de-
[fol. 45] fined in the 1948 Cotton Loan Instructions, and that the proceeds of the loan evidenced by the Note had been paid on the date shown on the Note and in the manner directed by the producer obtaining the loan. Both the said Bank and its officer aforementioned knew that the cotton listed on the Notes was ineligible for loan because it had not been pledged by the producers thereof and they knew that the proceeds of the said Notes had not been paid on the date shown on the Notes and in the manner directed by the producers obtaining the loans.

18. The defendants made or caused to be made, or presented or caused to be presented, for payment or approval to persons or officers in the Civil Service of the United States the number of claims below listed upon or against the Government of the United States, or a Department or officer thereof, knowing such claims to be false, fictitious, or fraudulent to plaintiff's damage, and the defendants

for the purpose of obtaining or aiding to obtain the payment of said false claims, made, used or caused to be made or used false certifications knowing the same to contain fraudulent or fictitious statements or entries:

Toepleman and Greenway—82 false claims;
Walter Moseley—41 false claims;
Henderson and the First Citizens Bank and Trust Company—9 false claims.

19. Each of the false claims was approved by a person in the Civil Service of the United States and plaintiff, acting through CCC, paid such claims so that the defendants thereby fraudulently obtained payments to which they were not entitled.

20. By reason of the promises and pursuant to the provisions of Section 5438 and 3490, Revised Statutes, each of the defendants, Frederick L. Toepleman and Garland Greenway became and is liable to forfeit and pay to the United States the sum of $2,000.00 for each of the 82 false claims referred to in paragraph 18 hereof, and, in addition, [fol. 46] double the amount of the damages sustained by the United States by reason of the acts complained of, together with interest and the costs of this suit; and defendant, Walter B. Moseley, became and is liable jointly and severally with the defendants Toepleman and Greenway to forfeit and pay to the United States the sum of $2,000.00 for each of 41 of the 82 false claims referred to above, and, in addition, double the amount of the damages sustained by the United States by reason of the acts complained of, together with interest and the costs of this suit; and each or the defendants A. E. Henderson and the First Citizens Bank and Trust Company became and is liable jointly and severally with the defendants Toepleman and Greenway, to forfeit and pay to the United States the sum of $2,000.00 for each of 9 of the false claims referred to above, and, in addition, double the amount of the damages sustained by the United States by reason of the acts complained of, together with interest and the costs of this suit.

Wherefore, plaintiff demands judgment against each of the defendants Frederick L. Toepleman and Garland Greenway in the sum of $164,000.00; and plaintiff demands judgment against Walter B. Moseley in the sum of $82,-

000.00; and plaintiff demands judgment against each of the defendants, A. E. Henderson and First Citizens Bank and Trust Company in the sum of $18,000.00; plus, with respect to each defendant, double the amount of the damages which this Court shall find, together with interest and costs of this suit.

(S.) Julian T. Caskill, United States Attorney;
(S.) Lawrence Harris, Assistant United States Attorney.

[fol. 47] IN UNITED STATES DISTRICT COURT

ANSWER OF FREDERICK L. TOEPLEMAN, INDIVIDUALLY, AND AS MEMBER OF THE PARTNERSHIP OF FREDERICK L. TOEPLEMAN AND GARLAND GREENWAY, DOING BUSINESS AS GARLAND GREENWAY

Frederick L. Toepleman, individually, and as a member of the partnership of Frederick L. Toepleman and Garland Greenway, doing business as Garland Greenway, for answer to the plaintiff's complaint, says:

1. That the allegations of paragraph one of said complaint are not denied.

2. That the allegations of paragraph two of said complaint are not denied.

3. That the allegations of paragraph three of said complaint are denied.

4. That this defendant neither admits nor denies the allegations of paragraph four of said complaint for the reason that said paragraph does not relate to or effect this defendant.

5. That this defendant does not have sufficient knowledge or information to enable him to form a belief as to the truth of the allegations of paragraph five of said complaint and he therefore denies said allegations.

6. That this defendant does not have sufficient knowledge or information to enable him to form a belief as to the truth of the allegations of paragraph six of said complaint and he therefore denies said allegations.

7. For answer to paragraph seven of said complaint this defendant admits that he is not in the military or naval forces of the United States or in the militia called into or actually employed in the service of the United States.

8. That this defendant does not have sufficient knowledge or information to enable him to form a belief as to the truth [fol. 48] of the allegations of paragraph eight of said complaint and he therefore denies said allegations.

9. That this defendant does not have sufficient knowledge or information to enable him to form a belief as to the truth of the allegations of paragraph nine of said complaint and he therefore denies said allegations.

10. That this defendant does not have sufficient knowledge or information to enable him to form a belief as to the truth of the allegations of paragraph ten of said complaint and he therefore denies said allegations.

11. That this defendant does not have sufficient knowledge or information to enable him to form a belief as to the truth of the allegations of paragraph eleven of said complaint and he therefore denies said allegations.

12. That the allegations of paragraph twelve of said complaint are untrue and this defendant denies said allegations.

13. That this defendant denies the allegations of paragraph thirteen of said complaint, as stated.

14. That this defendant denies the allegations of paragraph fourteen of said complaint, as stated.

15. That this defendant denies the allegations of paragraph fifteen of said complaint, as stated.

16. That this defendant denies the allegations of paragraph sixteen of said complaint, as stated.

17. That this defendant denies the allegations of paragraph seventeen of said complaint, as stated.

18. That the allegations of paragraph eighteen of said complaint are untrue and this defendant denies said allegations.

19. That the allegations of paragraph nineteen of said complaint are untrue and this defendant denies said allegations.

20. That the allegations of paragraph twenty of said complaint are untrue and this defendant denies said allegations.

[fol. 49] Wherefore, having fully answered, this defendant prays that the plaintiff recover nothing of him individually or as a partner of Garland Greenway, and that

this defendant go hence and recover of the plaintiff his costs of action to be taxed.

Frank W. Hancock, Jr., Attorney for Frederick L. Toepleman, Individually, and as a Partner of Garland Greenway; B. S. Royster, Jr., Attorney for Frederick L. Toepleman, Individually, and as a Partner of Garland Greenway.

In United States District Court

Memorandum By The Court With Findings of Fact and Conclusions of Law

This action was instituted against several defendants, but prior to the hearing a dismissal was entered with respect to all defendants other than Frederick L. Toepleman and Garland Greenway.

The claim of the Government is made under the False Claims Act, Title 31, Sec. 231-233. Section 231 reads, so far as pertinent here: "Any person . . . who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person . . . any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of [fol. 50] obtaining or aiding to obtain the payment or approval of such claim, makes, uses or causes to be made or used, any false bill, receipt, voucher . . . claim . . . knowing the same to contain any fraudulent or fictitious statement . . . or who enters into any agreement . . . or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim . . . shall forfeit and pay to the United States the sum of $2,000.00, and, in addition, double the amount of damage which the United States may have sustained . . . , together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit." Jurisdiction is given by Section 232.

Defendants advance certain arguments, any one of which, if decided adversely to the Government, would make

it unnecessary to consider the case on its factual merits. These arguments will now be considered.

It is contended that the action is barred by Section 2462, Title 28, which reads "Except as otherwise provided by Act of Congress, an action . . . for the enforcement of any civil fine, penalty, or forfeiture . . . shall not be entertained unless commenced within five years from the date when the claim first accrued . . ." The commission of the acts upon which the claim is based occurred more than five years before the commencement of the action, and, therefore, the claim is barred if the quoted statute applies. I am of the opinion, however, that it does not, but rather that Section 235, Title 31, applies. This statute is found in the chapter dealing with debts due by or to the United States, of which the False Claims Act is a part, and reads: "Every such suit shall be commenced within six years from the commission of the act, and not afterward." This provision, therefore, applies specifically to actions for forfeitures and damages based on false claim, such as this. The [fol. 51] acts complained of were committed within the six-year period just before the action was commenced and there is no statutory bar. In United States v. Berin, 209 F. 2d 145, the six-year statute was held applicable, though it does not appear that the applicability of the five-year statute was advanced as an apparent argument.

Another argument of defendants is that even if false claims were filed by defendants they were not filed "upon or against the Government of the United States, or any departure or officer thereof" within the words or spirit of the statute, since the Commodity Credit Corporation, against whom the evidence shows the claims were filed, is not a "department" or "officer" of the United States, and that the action is improperly brought in the name of the Government as plaintiff.

The Commodity Credit Corporation, as it now exists, was created by Congress by act which became effective June 29, 1948, and in the first paragraph, Sec. 714, Title 15, we find that Congress declared: "(The Corporation) . . . shall be an agency and instrumentality of the United States, within the Department of Agriculture . . ." The United States owns all the capital stock and the money used to pay the fraudulent claims alleged to have been filed was that of

the United States. It appears plain that the Commodity Credit Corporation is a department of the United States, if not the United States itself, within the meaning of the statute. This statute has been construed broadly "to reach any person who knowingly assisted in causing the Government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government." United States, Ex Rel. Marcus v. Hess, 317 U.S. 537, 544. The purpose of the statute was to prohibit the drawing of any money from the Treasury of the United States upon any false claim.

[fol. 52] With respect to the position of defendants to the effect that the action was instituted improperly in the name of the United States, it is sufficient only to refer to the statutes. Secion 231 provides that the guilty party "shall forfeit and pay to the United States" and Section 232 clearly contemplates that the action may be brought either by the United States or, under some circumstances, by an informer in the name of the United States. The action is properly brought in the name of the United States.

Let us now come to a consideration of the case on its merits.

At all times involved, Frederick L. Toepleman and Garland Greenway, the defendants, were residents of Vance County, North Carolina.

During the period from July, 1948, through June, 1949, defendants were partners under the name "Garland Greenway", with offices in Henderson and Louisburg.

At no time was either defendant in the military or naval forces of the United States or in the militia called into or actually employed in the service of the United States.

The Commodity Credit Corporation was and is an agency and instrumentality of the United States within the Department of Agriculture whose officials and employees were and are persons in the Civil Service of the United States.

During the cotton marketing year from July 1, 1948, through June 30, 1949, the Commodity Credit Corporation conducted the Cotton Loan Program as authorized by its charter, the statutes, and regulations published at 13 F. R. 4338. Under this program non-recourse loans were provided for an eligible producer, who had to be a person who

produced cotton in 1948, on eligible cotton, which had to be produced by the person tendering it for a loan.

To obtain a loan under the program an eligible producer had to tender a duly executed 1948 Cotton Producer's Note [fol. 53] and Loan Agreement to Commodity Credit Corporation, either directly or indirectly through one of its approved lending agencies, listing the warehouse receipt numbers and description of eligible cotton as security for the non-recourse loan.

Commodity entered into separate Lending Agency Agreements with the First National Bank, Henderson, N. C., and First Citizens Bank & Trust Co., Louisburg, N. C., covering loans under the 1948 prgram. Each agreement authorized the agency bank to make loans to producers in accordance with the provisions of the 1948 Loan Instructions. Commodity agreed to reimburse the agency bank for all loans advanced in accordance with the loan instructions.

The defendants obtained eighty-two 1948 Producer's Notes which were unexecuted except for signatures in blank by R. B. Baird, Ashton Davis, Olie Gupton, E. B. Jones, John Lambert, S. A. Moseley, W. B. Moseley, J. T. Parrish, W. T. Paschall, F. G. Poythress, Robert Wilkins, Herman Winn, Shelton Wright and J. T. Wright.

The partnership of Toepleman and Greenway purchased from various sources 325 bales of 1948 cotton, using partnership funds.

The defendant Toepleman listed or caused to be listed on the eighty-two notes signed in blank the warehouse receipt numbers and description of the 325 bales of cotton purchased from various sources by the partnership. The partnership held full title to and owned the 325 bales at the time they were listed on the 82 notes and at the time the notes and warehouse receipts were tendered to the lending agencies.

The partnership, through Toepleman, tendered 57 of the notes to the First National Bank and 25 of them to First Citizens Bank and Trust Company, to obtain loans under the 1948 program and requested a disbursement of the loan proceeds. Each bank disbursed to the partnership the loan [fol. 54] proceeds of the notes tendered to it, and made no disbursement to the producers listed on the notes. The full proceeds of the 82 notes were received by the partnership.

The banks then transmitted the 82 notes to Commodity and received from it reimbursement for the loan proceeds paid to the partnership. The First National Bank transmitted 57 of the notes by ten letters of transmittal, and the First Citizens Bank & Trust Company 25 notes by four letters of transmittal.

Thirty-nine of the notes were paid by the partnership in March, 1949, and the cotton security redeemed, so that Commodity suffered no loss on those loans. Forty-three of the notes were not paid at maturity and the unredeemed cotton securing these loans was sold on January 11, 1955, for $6,733.97 less than the face of such notes, resulting in a loss to plaintiff in that amount.

The activities above set forth were accomplished by the partnership, but all transactions were handled by Toepleman and Greenway had no actual knowledge of the pledge of any bale of ineligible cotton. Toepleman, of course, had actual knowledge that every bale pledged on the eighty-two notes was ineligible because not produced by the borrower.

Having determined that the defendant Greenway is not liable to plaintiff in any event, I will dispose of the case as to him first, leaving certain questions pertinent to the case against Toepleman for later discussion. As a basis of liability it must appear that a false claim was filed "knowing such claim to be false." I have found, and I think even the evidence for plaintiff shows, that the defendant Greenway had no personal knowledge of any false claim against the plaintiff. It is suggested that the Court should find the two defendants entered into a conspiracy to file the false claims, but I find on the evidence that no such conspiracy existed. It may be logically argued that Greenway was careless in his attitude toward the partnership affairs and [fol. 55] that closer attention would have prevented the filing of the false claims. I find this as a fact, but I deem such finding far short of a finding that there was a conspiracy between the partners. It is argued also that even if Greenway was actually ignorant of the fact that Toepleman was filing false claims, he is liable because of his relation as partner to Toepleman, citing North Carolina G. S. 59-43, which is in these words: "(w)here, by any wrongful act or omission, of any partner acting in the ordinary course of business of the partnership or with the authority

of his copartners, loss or injury is caused to any person, not being a partner . . . or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act." It is my opinion that this statute does not sustain plaintiff's position. It should be noted that the North Carolina statute says "the partnership is liable", not each partner. This is not an action against the partnership. Partnership assets might possibly be applied to the payment of the forfeitures and damages, but this action is against Greenway as an individual, not as a partner. It is urged that the statute applies because it uses the word "penalty", but actually this not an action for penalties. Helvering, Commissioner v. Mitchell, 303 U. S. 391. No helpful decision on this point has been cited or found, but Greenway's counsel note the decisions construing Sec. 32, Sub-section c (1), Title 11, denying discharge to a bankrupt who has committed the offense "of having knowingly and fraudulently . . . (made) a false oath . . . in relation to any bankruptcy proceeding . . ." The majority rule seems to be that a false statement made by one partner, unknown to an innocent partner, will not support denial of discharge to such innocent partner. In re Josephson, et al., 229 F. 272.

I find that the defendant Greenway is not liable to plaintiff as under the evidence it does not appear that he made [fol. 56] a false claim knowing it to be "false, fictitious or fraudulent", and that he is not liable to plaintiff by reason of the partnership relationship with defendant Toepleman, who, of course, knew that the cotton pledged in the notes was ineligible for loans under the act.

Although the defendant Toepleman does not deny either that each of the eighty-two notes pledged ineligible cotton, that is, cotton not produced by the borrower, or that such fact was known to him, his counsel advance several arguments against liability under the statute. One of such arguments is that the presentation of a note to a lending agency bank representing Commodity which is false in that ineligible cotton is pledged, does not constitute the filing of a false claim within the meaning of the statute. I am referred to United States v. McNinch, 138 F. Supp. 711, and the following language of the Court: "It seems evident that, if the statute is n[illegible] to apply here, it will be after the

Court has effected some very drastic amendments to the act, such as holding a credit application directed to a bank is the same as a 'claim upon or against the government of the United States, or any department, or officer thereof', the bank, of course, being regarded as the government, or a department thereof." With all respect I disagree. Commodity, under the act, was obligated to make loans on eligible cotton, the banks were authorized agents of Commodity, and Commodity is a Department of the United States within the meaning of the statute, as above pointed; so that I see no reason why the filing of application for a loan which is false should not be considered filing a false claim against the "government of the United States, or any department or officer thereof". As quoted above, (the statute has been construed broadly) "to reach any person who knowingly assisted in causing the government to pay [fol. 57] claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government".

In this connection, it should be borne in mind that the notes which were tendered to Commodity were not the ordinary Commercial notes, since the government under the program had no recourse upon the makers. The maker (supposedly the producer) could in each instance pay the loan before maturity and redeem his cotton; in event of default the government is authorized to sell the cotton but must account to the producer for any surplus. The program, therefore, clearly contemplated a loss to the government to be paid out of Treasury funds. The government under the program did not agree to lend its money to speculators nor to purchase their cotton, but only agreed to give these benefits to producers on eligible cotton. So that when by false representation a person, as Toepleman, obtained a loan by which he could not suffer but by which the Government might suffer loss, he was getting benefits to which he was not entitled, and in my view this constituted filing a false claim within the meaning of the statute.

Toepleman's counsel also insist that there is no liability because the plaintiff was not damaged. Leaving to the side for this argument that there is evidence of damage in respect to forty-three of the notes, it appears to me that the Government's case is made by showing that a false claim

was knowingly filed and that it is unnecessary to show either an intent to defraud or resulting damage. In some of the clauses of the act it is expressly provided that there must be shown an intent to defraud, but in the clause applicable here no such words are used. Proof of knowingly presenting a false claim is all that is required. The wording of the statute strongly indicates that recovery is not dependent upon proving loss or damage, since it there stated that a person doing the prohibited acts "shall for- [fol. 58] feit and pay to the United States the sum of $2,000.00, and, in addition, double the amount of damage." Had the intent of Congress been that proof of damage is essential, it seems reasonable to infer that the wording would have been such as: where damage to Government is shown, the offender shall pay double the amount of same, and, in addition, shall forfeit the sum of $2,000.00. Nor, in my opinion, was it necessary for the plaintiff to prove profit to Toepleman.

See Rex Trailer Co. v. United States, 350 U. S. 145, 152: "It is insisted, however, that the failure of the Government to allege specific damages precludes recovery here. But there is no requirement, statutory or judicial, that specific damages be shown, and this was recognized by the Court in Marcus."

Toepleman's counsel further insist that if plaintiff is entitled to recover anything the recovery should be limited to one forfeiture of $2,000.00, treating the dealings of Toepleman as a single transaction, but I am unable to see it. Each note constituted a false claim and plaintiff should recover $2,000.00 in each instance, or $164,000.00. The Marcus case sustains this conclusion.

The remaining question is whether the plaintiff is entitled to recover anything for damages. I think not. According to the wording of the statute, where a false claim is filed the one so filing "shall forfeit an pay to the United States the sum of $2,000.00, and in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act." Obviously, "such act" means the presenting of the false claim and the Government actually was not specifically damaged by reason of the falsity of the claim. It is true the Government lost money on some of the transactions but such loss did not

result because ineligible cotton was pledged. The market value of the cotton was the same as it would have been had [fol. 59] it been producer's cotton, and the loss here where the Government held the cotton over six years would have been exactly the same had every bale of the cotton been eligible for loan and, consequently, no false claims filed. The Government's loss was due to the drop in the price in cotton, not to the drop in the price of ineligible cotton. There was no damage to the Government within the meaning of the statute.

So that, the Government is not entitled to recover of the defendant Garland Greenway, but is entitled to recover $164,000.00 of the defendant Frederick L. Toepleman, together with the costs. He is entitled, as the Government agrees, to a credit of $2,000.00 heretofore paid without prejudice.

Judgment accordingly will enter.

Don Gilliam, United States District Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, RALEIGH DIVISION

No. 822 Civil

UNITED STATES OF AMERICA, Plaintiff,

vs.

FREDERICK L. TOEPLEMAN and GARLAND GREENWAY, Defendants

JUDGMENT

The above-entitled action came on for trial before the Court, without a jury, on the 13th day of March, 1956 at Raleigh, North Carolina, the plaintiff appearing by attor- [fol. 60] ney, Department of Justice, and Assistant United States Attorneys for the Eastern District of North Carolina, and the defendant Frederick L. Toepleman appearing in person and by B. S. Royster, Jr., and F. W. Hancock, Jr., esqs. of Oxford, North Carolina, and the defendant Garland Greenway appearing in person and by Banzet and Banzet, attorneys of Warrenton, North Carolina, and evi-

dence having been offered by all parties, and the Court having filed its Findings of Fact, Conclusions of Law, and Order for Judgment herein, now, pursuant to said Order for Judgment:

It is hereby Ordered and Adjudged that the plaintiff United States of America have Judgment against the defendant Frederick L. Toepleman in the sum of One Hundred Sixty-four Thousand ($164,000.00) Dollars, together with interest thereon at the rate of 6% per annum from the date of entry of this Judgment, until paid; that the sum of Two Thousand ($2,000.00) Dollars heretofore paid, without prejudice, to the plaintiff by the said defendant Frederick L. Toepleman be applied to the instant Judgment; and for the costs of the instant action, including the attorney's docket fee, to be taxed by the Clerk of this Court; and

It is further Ordered and Adjudged that the plaintiff United States of America recover nothing of the defendant Garland Greenway.

The Clerk of this Court will certify a transcript of this Judgment, in duplicate, for docketing in the office of the Clerk of the Superior Court of Vance County, North Carolina.

Don Gilliam, United States District Judge.

[fols. 61-62]

Appendix to Brief of the United States as Appellee and Cross-Appellant—Filed January 7, 1957

[fol. 63] IN UNITED STATE DISTRICT COURT

ANSWER OF GARLAND GREENWAY.

The defendant Garland Greenway for Answer to the Complaint alleges:

1. The defendant Garland Greenway admits paragraph One of the Complaint.

2. The defendant Garland Greenway admits paragraph Two of the Complaint.

3. The defendant Garland Greenway denies paragraph Three of the Complaint.

4. The defendant Garland Greenway admits paragraph Four of the Complaint.

5. The defendant Garland Greenway admits paragraph Five of the Complaint.

6. The defendant Garland Greenway admits paragraph Six of the Complaint.

7. The defendant Garland Greenway admits paragraph Seven of the Complaint.

8. The defendant Garland Greenway admits that part of paragraph Eight which alleges that the Commodity Credit Corporation is an agency and instrumentality of the United States but alleges that he without knowledge or information sufficient to form a belief as to the truth of the other allegations of paragraph Eight.

9. The defendant Garland Greenway admits paragraph Nine of the Complaint.

10. The defendant Garland Greenway admits paragraph Ten of the Complaint.

11. The defendant Garland Greenway alleges that he is without knowledge or information sufficient to form a [fol. 64] belief as to the truth of the allegations contained in paragraph Eleven of the Complaint.

12. The defendant Garland Greenway denies the allegations of paragraph Twelve of the Complaint.

13. The defendant Garland Greenway admits that on occasions, not pertinent to plaintiff's alleged cause of action, and not as a partner of Frederick L. Toepleman, he induced producers to sign notes in blank, but denies all other allegations of paragraph Thirteen.

14. The defendant Garland Greenway denies the allegations of paragraph Fourteen.

15. The defendant Garland Greenway denies the allegations of paragraph Fifteen.

16. The defendant Garland Greenway alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph Sixteen of the Complaint.

17. The defendant Garland Greenway alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph Seventeen of the Complaint.

18. The defendant Garland Greenway denies the allegations of paragraph Eighteen.

19. The defendant Garland Greenway denies the allegations of paragraph Nineteen of the Complaint.

20. The defendant Garland Greenway denies the allegations of paragraph Twenty of the Complaint.

For further answer and defence, the defendant Garland Greenway alleges:

First Defence

The claim stated in the Complaint did not accrue within five (5) years before the commencement of this action and is therefore barred by the provisions of Section 2462 of Title 28, United States Code.

Wherefore, the defendant Garland Greenway prays that [fol. 65] the plaintiff recover nothing by its action and demands trial by jury on the issues raised by the pleadings.

Frank Banzet, Attorney for the Defendant, Garland Greenway.

In United States District Court

C. C. C. Cotton Form D

U. S. Department of Agriculture

Commodity Credit Corporation

Government Exhibit G-3

Original

Lending Agency Agreement

Covering Loans on Cotton of the 1948 Crop

This Agreement made and entered into as of the 4th day of Aug., 1948, by and between Commodity Credit Corporation (hereinafter referred to as CCC), an agency of the United States, and First National Bank, Henderson, North Carolina (hereinafter referred to as the "Lending Agency").

Witnesseth:

Whereas CCC has undertaken a Cotton Loan Program for cotton of the crop specified above and has issued Cotton

Loan Instructions (C. C. C. Cotton Form 1, hereinafter referred to as the "Instructions") for such program for setting out the terms and conditions under which producers may obtain loans secured by cotton of such crop, which Instructions and any amendments and supplements thereto are hereby made a part of this agreement and are to apply hereto the same as though they were expressly rewritten and included herein; and

Whereas CCC desires to facilitate completion of such loans and the Lending Agency desires to make such loans; [fol. 66] Now Therefore, in consideration of the premises and the mutual covenants and agreements herein contained, the parties hereto agree for themselves, their successors, and their assigns, as follows:

1. On and after the date of execution of this Agreement by the Lending Agency and CCC, the Lending Agency may make loans in accordance with the provisions of the Instructions and this Agreement to producers of cotton of the crop specified above. Such loans shall be made upon tender by the producers of duly executed Cotton Producer's Note and Loan Agreement (C. C. C. Cotton Form A) (hereinafter referred to as "notes") and warehouse receipts representing such cotton and meeting the requirements of the Instructions. Such notes shall be used by the Lending Agency only in making loans under this Agreement. The date of each note must be the date on which the Lending Agency makes disbursement of the loan proceeds to the producer. The Lending Agency shall not make a loan on cotton pursuant to this Agreement if, to its knowledge, the cotton is damaged, destroyed, or impaired, is subject to any prior lien or encumbrance, or is otherwise ineligible for a loan under the Instructions. The Lending Agency shall not make any deduction for interest, commission, exchange, or other charges (except the authorized Clerk's fee, in case the Lending Agency has executed the Clerk's Certificate on the note) from the amount of any loan hereunder.

2. The Lending Agency shall tender all notes evidencing loans which it has made in accordance with the provisions of section 1 hereof, together with the warehouse receipts representing the cotton securing such notes, to the New Orleans Office, Commodity Credit Corporation, Produc-

tion and Marketing Administration, New Orleans 12, La., [fol. 67] within 15 days after the date of such notes. Such tender shall be made by a duly executed Lending Agency's Letter of Transmittal (C. C. C. Cotton Form C), in triplicate, stating whether the notes are transmitted for purchase or for pooling. All of the notes tendered on any one letter of transmittal must be secured by cotton stored in the same custodial district, as defined in the Instructions. Forty notes shall be submitted on each letter of transmittal except when fewer notes are listed in order that they may be tendered within 15 days after execution. One copy of the letter of transmittal will be returned to the Lending Agency and will constitute a receipt for the notes. All notes tendered hereunder will be examined by CCC and notes found to be unacceptable will be returned. Notes returned will be accepted if retendered in acceptable form.

3. If notes tendered pursuant to section 2 hereof are tendered for purchase, CCC shall, as soon as practicable, pay to the Lending Agency the face value of the notes accepted plus interest thereon at the rate of 1½ percent per annum from the respective dates of such notes to the date of payment of the purchase price by CCC.

4. If notes tendered pursuant to section 2 hereof are tendered for pooling, the notes which are accepted shall be placed in a pool, which shall be operated by CCC as follows:

(*a*) A separate pool shall be established in each custodial district, as defined in the Instructions, for the notes secured by cotton stored in that district, and the custodial office for the district shall act as custodian of the pool.

(*b*) The custodial office shall issue to the approved Lending Agency designated in the letter of transmittal on which the notes were tendered a Certificate of Interest (C. C. C. Cotton Form H) (hereinafter re- [fol. 68] ferred to as a "certificate") in a face amount equal to the face amounts of the notes deposited, evidencing the deposit of such notes in the pool pursuant to this Agreement. The face amount of the certificate, less payments thereon, shall constitute the value of the certificate, which shall bear interest from the date of issuance at the rate of 1½ percent per annum payable

at the time and upon the amount of each payment made upon the certificate.

(*c*) The custodial office, upon issuing a certificate, shall act as custodian thereof for the certificate holder until it is retired or purchased by CCC and shall, as promptly as possible after issuing the certificate, furnish the certificate holder with a copy thereof. The custodial office shall enter on the reverse side of the certificate all payments made thereon. When any certificate is retired by payment to the holder of the value thereof, plus interest, the certificate shall be canceled. Canceled certificates shall be retained by the custodial office.

(*d*) At the time of the issuance of a certificate, CCC shall pay to the certificate holder interest at the rate of 1½ percent per annum upon the face amounts of the notes whose deposit it evidences from the respective dates of such notes to the date of issuance of the certificate.

(*e*) A certificate may be transferred only upon the following conditions: A transfer may be made only to another lending agency which has entered into a Lending Agency Agreement with CCC covering cotton of the crop specified above. Only two transfers of the certificate may be made. A transfer may be made only by an assignment of Certificate of Interest (C. C. C. Cotton Form I and will be effective only upon the receipt and acceptance of such form by CCC. An assignment received during the first 10 days of any month will not be accepted [fol. 69] and will not be effective until the end of such period, and any payment upon the certificate during such period will be made to the transferror rather than the transferee.

(*f*) CCC may, and shall upon demand by the certificate holder, purchase any outstanding certificate at any time by paying to the certificate holder the value thereof plus accrued interest. Upon such purchase the certificate shall be canceled by the custodial office, but CCC shall participate in the pool to the same extent as if the certificate had not been canceled.

(*g*) CCC may deposit in the pool any notes held by

CCC or other documents evidencing loans made by CCC under such program. No certificate shall be issued to CCC to evidence the deposit of such notes and documents, but CCC shall participate in the pool in the same manner as if a certificate had been issued.

(*h*) The proceeds obtained each month through collection or other appropriate credits to the principal amounts of the notes deposited in the pool, and any undistributed proceeds from previous months shall be divided during the 10-day period following the end of the month between CCC and certificate holders in the same proportion as the value of CCC's interest in the pool bears to the total value of all certificates outstanding on the last day of the month: *Provided, however,* That such distribution shall not be made if CCC determines that such action is impracticable. That part of the pool proceeds which is to be paid to the certificate holders shall be divided among them in proportion to the total value of the certificates held by each certificate holder, and such payments shall be credited by the custodial office against the certificate held by each certificate holder which have been outstanding for the longest time: *Provided, however,* That if such credit would reduce the value of any certificate [fol. 70] to less than $100, the payment to the certificate holder may be increased by an amount sufficient to retire the certificate; *And provided further,* That the payment to any certificate holder shall not exceed the total value of the certificates which he holds.

(*i*) Any proceeds, notes, and other loan documents remaining in the pool after all of the certificates have been retired shall become the property of CCC.

(*j*) If any certificates have not been retired upon final liquidation of the pool, CCC shall pay to the holders of the certificates the value thereof, plus interest.

5. In any case in which the Lending Agency has actual knowledge at the time a loan is made that the borrower has made a fraudulent representation in obtaining the loan, the Lending Agency shall be liable for any loss incurred as a result of the making of such loan.

6. The Corporation shall have the right to terminate this Agreement by giving the Lending Agency 10 days' written

notice of its intention to do so, but such termination shall not affect the rights and obligations of the parties hereto with respect to loans made by the lending agency prior to the effective date of such termination. Upon the effective date of such termination, the Lending Agency shall cease to make loans hereunder.

In Witness Whereof, the parties hereto have caused this Agreement to be executed on the date set forth above.

[fol. 71] Commodity Credit Corporation, by —— —— (Contracting officer), —— —— (Lending agency), By —— ——, (Title).

Attest: —— —— (Title).

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, RALEIGH DIVISION

No. 822 Civil

UNITED STATES OF AMERICA

vs.

FREDERICK L. TOEPLEMAN AND GARLAND GREENWAY, AS INDIVIDUALS; Frederick L. Toepleman and Garland Greenday, partners dba Garland Greenway, Walter B. Moseley, A. E. Henderson, First Citizens Bank & Trust Company, Louisburg, North Carolina.

TRANSCRIPT OF TESTIMONY—March 12, 1956

APPEARANCES:

For the Government:

Mr. William Barton, of the Department of Justice.
Miss Jane A. Parker, Assistant United States Attorney.
Mr. Lawrence Harris, Assistant United States Attorney.

For the defendant Frederick L. Toepleman:

Mr. B. S. Royster, of Oxford, N. C.
Mr. F. B. Hancock, Jr., of Oxford, N. C.

[fol. 72] For the defendant Garland Greenway: Messrs. Banzet & Banzet, of Warrenton, N. C.

All parties agree that the case is to be tried without a jury.

Mr. Barton. This is a suit under the false claims act for double claims and forfeitures for submitting false claims under the 1948 cotton program and the allegation is that, the defendants Greenway and Toepleman entered into an agreement, combination and conspiracy in entering false notes. That they carried this out and submitted some eighty-two false notes pledging cotton representing that farmers themselves were pledging it and according to the Statute the government is asking for double damage. The statute says $2,000 forfeiture for each false claim. Certainly a question for the Court to determine is what is a false claim.

The Court. How many bales were there?

Mr. Barton. Three hundred and twenty-five and listed in 82 notes. It says false, fictitious, fraudulent claims.

The Court. If he were to include one that he thought came within the provision of the act but as a matter of fact was wrong about it would he be liable?

Mr. Barton. We are alleging that actually the defendants put cotton in the loan in the names of various farmers. Those farmers had a perfect right to put cotton in the loans which they had produced in their own names and in their own notes but Mr. Toepleman and Mr. Greenway couldn't come in and put cotton in it to make a profit.

The Court. They had to grow it themselves.

Mr. Barton. Yes, sir.

Mr. Harris: The claim against W. B. Moseley, A. E. [fol. 73] Henderson and the First Citizens Bank & Trust Company has been settled.

Frank G. Poythress, being sworn, testified as follows:

Direct examination.

By Mr. Barton:

Q. State your name.
A. Frank G. Poythress.

Q. Where do you live?
A. Brunswick County, Virginia.
Q. What is your occupation?
A. Farming.
Q. Were you farming in 1948?
A. Yes, sir.
Q. Run a cotton gin in 1948?
A. Yes, sir.
Q. Buy cotton from people patronizing your gin?
A. Yes, sir.
Q. You bought and sold this cotton?
A. Yes, sir.
Q. Did you sell any cotton to the defendants in this case?
A. Yes, sir. I sold some to Mr. Toepleman.
Q. Did you sign any notes for Mr. Toepleman?
A. Yes, sir.
Q. How did that happen?

Objection by Defendant Toepleman.

A. Yes, I signed some.

(Short morning recess.)

Q. Mr. Poythress, you said earlier that you grew some cotton yourself in 1948.
A. Yes, sir.
Q. Did you put any of that cotton in Commodity Credit loan?
A. No, sir.
Q. I show you Government Exhibits 1 through B-19 and ask you if that is your signature on each one? Tell [fol. 74] the Court if that is your signature?
A. Yes, sir, they are mine. I signed all of them.

The Court. How many?

Mr. Barton. There are nineteen notes.

Q. Now those notes, which are in evidence, state that you executed note at the First National Bank at Henderson, and on some of them with the First Citizens Bank & Trust Company, Louisburg, North Carolina. Did you deal with those banks?

Objection by Defendant Toepleman overruled.

A. No, sir.

Q. Did you sign any 1948 notes in blank?

A. No, sir. That is the only note I signed.

Q. When you signed those notes when was it, and for whom?

A. I haven't signed any notes.

Q. These are notes.

A. When I signed those notes I told Mr. Toepleman, at least we had talked it over about putting some cotton in storage. He told me if I signed those blanks when I got ready to put it in storage, ship it on, and I wouldn't have to go to Henderson. That is why I signed for Mr. Toepleman.

Q. What did you do with your cotton on hand?

A. After those things stirred up and I heard about it——

Objection by Defendant Toepleman overruled.

Mr. Barton. The witness has testified he signed some of those notes for Mr. Toepleman. He also testified he put no cotton into the loan.

Q. You say you signed those notes for Mr. Toepleman because it would be easier for you when you shipped cotton to Henderson.

A. Yes, sir; my own cotton and put it in storage.

Q. Did you have some?

[fols. 75-76] A. Yes, sir.

Q. What did you do with it?

A. It was there until I got all mine together and I sold it.

Q. You know to whom?

A. Mr. White at Littleton.

The Court. Was all this cotton you had bought?

A. I don't know. I signed this in blank. After I got my cotton together I sold it to Mr. White.

Q. The hundred bales you shipped to Mr. Toepleman, was that what you bought from other growers at the gin?

A. That's right. The cotton those drafts were drawn on and weights and bales were on those drafts.

By Mr. Barton:

Q. Knowing you had signed those notes for Mr. Toepleman, did you later have contact with him about those notes?

A. I came to his house, I can't remember the date, and asked him what happened to them and he said he had used them but was going to redeem them.

The Court: You mean when you signed the notes there was nothing written into the blank, that it was just a blank form note?

A. Yes, sir.

Q. Didn't have any amount?

A. No, sir.

Q. Where it lists the cotton was that blank?

A. Nothing on here. I just signed them. He had some notes and we were in the office. My niece was there. He said, "You sign those notes and when you send your cotton over there we will put it in storage and that will save you trouble having to come and sign those papers."

[fol. 77] IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7321

FREDERICK L. TOEPLEMAN, Appellant,

versus

UNITED STATES OF AMERICA, Appellee,

and

UNITED STATES OF AMERICA, Appellant,

versus

FREDERICK L. TOEPLEMAN and GARLAND GREENWAY, Appellee

Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh

DOCKET ENTRIES

October 18, 1956, record on appeal filed and appeals docketed.

October 18, 1956, original exhibits received from the Clerk of the United States District Court.

October 20, 1956, appearance of B. S. Royster, Jr., entered for appellant Frederick L. Toepleman.

October 20, 1956, statement under section 3 of rule 10 filed.

October 20, 1956, petition of Clerk of the United States District Court for extension of time to file record on appeal filed.

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING APPEAL—Filed October 24, 1956

On consideration of the application of A. Hand James, Clerk of the United States District Court for the Eastern District of North Carolina, and for good cause shown, [fol. 78] It is ordered that the time for filing the record on appeal and docketing the appeal in the above entitled cause be, and it is hereby, extended to and including October 18, 1956.

October 23, 1956.

John J. Parker, Chief Judge, Fourth Circuit.

October 26, 1956, appearance of F. W. Hancock, Jr., entered for the appellant Frederick L. Toepleman.

November 2, 1956, appearance of Frank Banzet entered for the appellee Garland Greenway.

November 3, 1956, appearance of Melvin Richter, Attorney, and William W. Ross, Attorney, Department of Justice, entered for the appellant United States of America.

December 22, 1956, stipulation as to the time for filing briefs filed.

January 2, 1957, brief and appendix of appellant Toepleman filed.

January 7, 1957, stipulation as to the time for filing briefs filed.

January 7, 1957, brief and appendix for the United States as appellee and cross-appellant filed.

[fol. 79] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7321

UNITED STATES OF AMERICA, Appellant,

vs.

GARLAND GREENWAY, Appellee

NOTICE OF MOTION—Filed January 10, 1957

To the Honorable Attorney General of the United States, Attorney for United States of America, Appellant:

You will please take notice that Garland Greenway, Appellee, will move before the Honorable United States Court of Appeals for the Fourth Circuit, in the City of Charlotte, North Carolina, at 9:30 o'clock A. M., on the 14th day of January, 1957, or as soon thereafter as counsel may be heard, to dismiss the case for that the said Appellant has failed to file its brief twenty (20) days before the term to which the case is docketed for hearing.

This 9th day of January, 1957.

Garland Greenway, Appellee, by Frank Banzet, His Attorney.

Frank Banzet, Court House Square, Warrenton, N. C., Attorney for Appellee.

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 80] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7321

UNITED STATES OF AMERICA, Appellant,

vs.

GARLAND GREENWAY, Appellee

MOTION TO DISMISS—Filed January 10, 1957

To the Honorable United States Court of Appeals for the Fourth Circuit:

The Appellee, Garland Greenway, moves this Honorable Court to dismiss this appeal for that the Appellant, United States of America, has failed to file its brief twenty (20) days before the term to which this case is docketed for hearing, pursuant to Rule 12 of this Court.

Respectfully submitted, this 9th day of January, 1957.

Garland Greenway, Appellee, by Frank Banzet, His Attorney.

Frank Banzet, Court House Square, Warrenton, N. C., Attorney for Appellee.

[fol. 81] IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7321

FREDERICK L. TOEPLEMAN, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee,

and

UNITED STATES OF AMERICA, Appellant,

vs.

FREDERICK L. TOEPLEMAN and GARLAND GREENWAY, Appellees

Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh

ORDER DISMISSING APPEAL AS TO GARLAND GREENWAY—Filed and entered January 14, 1957

On consideration of the motion of Garland Greenway to dismiss the appeal of the United States of America as to him in the above entitled case, and counsel for the United States of America not objecting thereto:

It is now here ordered by this Court that the appeal of the United States of America as to Garland Greenway be, and the same is hereby dismissed.

January 14, 1957.

John J. Parker, Chief Judge, Fourth Circuit.

[fol. 82] MINUTE ENTRY OF ARGUMENT AND SUBMISSION—January 14, 1957 (omitted in printing)

[fols. 83-94] OPINION—Omitted. Printed side page 12 supra

[fol. 95] IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7321

FREDERICK L. TOEPLEMAN, Appellant and Cross-Appellee,

vs.

UNITED STATES OF AMERICA, Appellee and Cross-Appellant.

Cross-Appeals from the United States District Court for the Eastern District of North Carolina

JUDGMENT—Filed and Entered February 28, 1957

This cause came on to be heard on the record from the United States District Court for the Eastern District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed in so far as it gives judgment against defendant and affirmed in so far as it denies recovery of damages under the statute; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of North Carolina, at Raleigh, for further proceedings in accordance with the opinion of the Court filed herein.

John J. Parker, Chief Judge, Fourth Circuit. Morris A. Soper, United States Circuit Judge. Albert V. Bryan, United States District Judge.

[fol. 96] April 2, 1957, mandate issued and transmitted to the Clerk of the United States District Court at Raleigh, North Carolina.

April 2, 1957, record on appeal and original exhibits returned to the Clerk of the United States District Court at Raleigh, North Carolina.

[fol. 97] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 98-99] IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7333

CATO BROTHERS, INCORPORATED, WILFRED R. CATO, WILLIAM R. CATO, and MAGIE L. DUNN (nee: Magie I. Stone), Appellants,

versus

UNITED STATES OF AMERICA, Appellee

Appendix to appellant's brief—Filed December 18, 1956

[fol. 100] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 1841

UNITED STATES OF AMERICA, Plaintiff

vs.

CATO BROTHERS, INC., WILFRED R. CATO, WILLIAM R. CATO, and MAGIE L. STONE, Defendants

COMPLAINT

1

This is a civil action brought by the United States of America as plaintiff under the provisions of Sections 3490 to 3492, inclusive, and Section 5438 of the Revised Statutes (31 U. S. C. 231-233) of which this court has jurisdiction under Section 3491 of the Revised Statutes, as amended (31 U. S. C. 232).

2

The defendant, Cato Brothers, Inc. is a corporation organized and existing under the laws of the State of Virginia, doing business in Emporia, Virginia, and whose stock is owned by Wilfred R. Cato, William R. Cato, and Magie L. Stone, all of whom are defendants herein, and Alfred Cato, who is not a defendant herein.

[fol. 101] 3

The defendant, Wilfred R. Cato, is a resident of Emporia, Virginia, within the jurisdiction of this court, and was at all times mentioned herein President and a Director of the defendant, Cato Brothers, Inc.

4

The defendant, William R. Cato, is a resident of Emporia, Virginia, within the jurisdiction of this court, and was at all times mentioned herein Secretary and a Director of the defendant, Cato Brothers, Inc.

5

The defendant, Magie L. Stone, is a resident of Emporia, Virginia, within the jurisdiction of this court, and was at all times mentioned herein Treasurer and a Director of the defendant, Cato Brothers, Inc.

6

None of the defendants is, nor at any time mentioned herein was, in the military or naval forces of the United States or in the militia called into or actually employed in the services of the United States.

7

Commodity Credit Corporation is an agency and instrumentality of the United States, the plaintiff herein, and all of the officers and employees of Commodity Credit Corporation are, and were at all times mentioned herein, persons in the civil service of the United States.

[fol. 102] 8

On July 23, 1948, Commodity Credit Corporation issued its 1948 Cotton Loan Instructions (13 F. R. 4338), a true and correct copy of which is annexed hereto, as a part hereof, marked "Plaintiff's Exhibit A", announcing a 1948 Cotton Loan Program under which loans would be made available to producers upon 1948 crop cotton which they had produced, as authorized and directed by Section 8 of the Stabilization Act o 1942, as amended (56 Stat. 767; 50

U. S. C., App. 968) and the Commodity Credit Corporation Charter Act (62 Stat. 1070; 15 U. S. C. 714).

9

Said 1948 Cotton Loan Instructions provided that loans on eligible cotton would be made available to eligible producers, defined an eligible producer as any person producing cotton in 1948 in the capacity of landowner, landlord, tenant, or sharecropper, and defined eligible cotton as cotton which, among other requirements, had been produced by the person tendering it for a loan. Said Instructions required a producer obtaining a loan on cotton to tender a duly executed 1948 Cotton Producer's Note and Loan Agreement (hereinafter referred to as a "Note"), a true and correct copy of a form of which is annexed hereto, as a part hereof, marked "Plaintiff's Exhibit B", listing the warehouse receipt numbers and description of the cotton and pledging the warehouse receipts representing the cotton as security for the loan.

10

Each Note contained the representations by the person executing the Note that he had produced the cotton, that he had the legal right to pledge the cotton as collateral se- [fol. 103] curity for the loan, that the benefits of the loan would accrue solely to him and any tenants or sharecroppers having an interest in the cotton or its proceeds, that the benefits of the loan had not been transferred to any other party by way of assignment, sale, or option, and that he was eligible for a loan on the cotton under the 1948 Cotton Loan Instructions.

11

On August 3, 1948, Commodity Credit Corporation and the defendant, Cato Brothers, Inc., entered into a Lending Agency Agreement, on CCC Cotton Form D, a true and correct copy of the form of which is annexed hereto, as a part hereof, marked "Plaintiff's Exhibit C", under which the defendant, Cato Brothers, Inc., was authorized to make loans to producers of 1948 crop cotton in accordance with the provisions thereof and said 1948 Cotton Loan Instructions, upon tender by the producers of warehouse receipts representing the cotton and duly executed Notes. Said

Lending Agency agreement further provided that Notes should be used by the defendant, Cato Brothers, Inc., only in making loans under said agreement; that the date on each Note *much* (sic) be the date on which the defendant, Cato Brothers, Inc., made disbursement of the loan proceeds to the producer; that said defendant should not make a loan on cotton pursuant to said agreement if, to said defendant's knowledge, the cotton tendered by the producer was ineligible for a loan under said 1948 Cotton Loan Instructions; that said defendant must not make any deduction for interest, commission, exchange, or other charges (except the authorized Clerk's fee) from the amount of any loan made pursuant to said agreement; that said defendant must tender all Notes evidencing loans made in accordance with said agreement to Commodity Credit Corporation, together with the warehouse receipts representing the cot- [fol. 104] ton listed on such Notes and duly executed Lending Agency's Letters of Transmittal; and that Commodity Credit Corporation would pay said defendant the face value of the Notes plus interest thereon at the rate of 1½ percent per annum from the date of such Notes to the date of payment by Commodity Credit Corporation.

12

During 1948 the defendants did enter into an agreement, combination, or conspiracy, and did agree, combine, and conspire to defraud the Government of the United States, or a department or officer therof, by obtaining or aiding to obtain the payment or allowance of false and fraudulent claims under said Lending Agency Agreement as herein set forth, to plaintiff's damage.

13

Between September 1, 1948, and November 30, 1948, the defendants induced various producers to sign numerous Notes in blank and listed on 288 of these Notes the warehouse receipt numbers and descriptions of bales of cotton owned by the defendant, Cato Brothers, Inc., which said defendant had purchased through its officers and employees from producers and other persons at less than the loan rates for such cotton under the 1948 Cotton Loan Program of Commodity Credit Corporation.

14

Between September 1, 1948, and November 30, 1948, in violation of the provisions of the Lending Agency Agreement referred to in paragraph 11 hereof, the defendants submitted said 288 Notes and the warehouse receipts representing the cotton listed on said Notes to Commodity Credit Corporation in the name of the defendant, Cato Brothers, [fol. 105] Inc. and thus made or caused to be made, or presented or caused to be presented, for payment or approval, to persons or officers in the civil service of the United States, 288 claims upon or against the Government of the United States, or a department or officer thereof, knowing such claims to be false, fictitious, or fraudulent, to plaintiff's damage.

15

The defendants retained the duplicate copies of the 288 Notes submitted to Commodity Credit Corporation.

16

Between September 1, 1948, and November 30, 1948, the defendants, for the purpose of obtaining or aiding to obtain the payment or approval of such claims, made, used, or caused to be made or used, false certificates, knowing the same to contain fraudulent or fictitious statements or entries in that each of the 288 Notes submitted to Commodity Credit Corporation contained the false certification that the person executing the Note had produced the cotton listed on the Note, that the benefits of the loan evidenced by the Note would accrue solely to him and any tenants or sharecroppers having an interest in the cotton or its proceeds, that the benefits of the loan had not been transferred to any other party by way of assignment, sale, or option, and that he was eligible for a loan on the cotton under said 1948 Cotton Loan Instructions.

17

Between September 1, 1948, and November 30, 1948, the defendants, for the purpose of obtaining or aiding to obtain the payment or approval of such claims, made, used, or caused to be made or used, false certificates, knowing the [fol. 106] same to contain fraudulent or fictitious statements or entries in that the defendant, Magie L. Stone,

acting as an official clerk appointed by the United States Department of Agriculture to assist producers in preparing loan documents, with the knowledge and consent of the other defendants herein, falsely certified on each of the Notes referred to in paragraph 13 that to the best of her knowledge and belief, all representations made by the producer executing the Note were true, complete, and correct, and that cotton listed on the Note was "eligible cotton," as defined in said 1948 Cotton Loan Instructions, and that she had delivered to the producer the duplicate copy of the Note.

18

During the period September 1, 1948, to November 30, 1948, the defendants, for the purpose of obtaining or aiding to obtain payment or approval of such claims, made, used, or caused to be made or used false certificates, knowing the same to contain fraudulent or fictitious statements or entries in that the defendant, Magie L. Stone, with the knowledge and consent of the other defendants herein and on behalf of defendant Cato Brothers, Inc., falsely certified in the "Payee's Certificate and Endorsement" on each of the Notes referred to in paragraph 13 hereof that she believed that the cotton listed on the Note was "eligible cotton," as defined in said 1948 Cotton Loan Instructions, and that the proceeds of the loan evidenced by the Note had been paid paid on the date shown on the Note and in the manner directed by the producer obtaining the loan.

19

Each of the false claims referred to in paragraph 14 hereof was approved by a person in the civil service of the United States, and plaintiff, acting through Commodity [fol. 107] Credit Corporation, paid to the defendant, Cato Brothers, Inc., the sum of $143,751.75, the face value of the 288 Notes plus 1½ percent interest to reimburse said defendant for the alleged use of its money in making loans to the producers who had signed such Notes, in the belief that such Notes represented loans which had been made by said defendant in accordance with the provisions of the Lending Agency Agreement referred to in paragraph 11 hereof, in reliance upon the certificates referred to in paragraphs 16, 17, and 18 hereof, and without knowledge

that such claims were false, fictitious, or fraudulent and that such certificates contained fraudulent or fictitious statements. The defendants thereby fraudulently obtained payments to which they were not entitled.

20

By reason of these premises and pursuant to the provisions of sections 3490 and 5438 of the Revised Statutes, each of the defendants became and is liable to forfeit and pay to the United States the sum of $2,000 for each of the 288 false claims referred to in paragraph 14 hereof, and, in addition, double the amount of damages which the United States sustained by reason of the acts complained of, together with interest and the costs of this suit.

Wherefore, plaintiff demands judgment against each of the defandants for the sum of $576,000 plus double the amount of damage this court shall find, together with interest and costs of this suit.

(S.) Lester S. Parsons, United States Attorney, (S.) James R. Moore, Assistant United States Attorney.

[fol. 108] IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION TO DISMISS

Defendants move that the complaint be dismissed upon the following grounds:

1. This court is without jurisdiction because the action has not been commenced within the period of time required by law.

2. The action is barred because not brought within the period of time required by law.

3. The complaint does not allege that plaintiff has been damaged.

4. 31 USCA § 231 does not provide or contemplate that a $2,000.00 forfeiture shall be paid for each separate note tendered. Thus an improper measure of and theory as to damages is stated by the complaint.

5. The complaint does not state a claim upon which relief can be granted.

Cato Bros., Incorporated, Wilfred R. Cato, William R. Cato, Magie S. Dunn, formerly Magie L. Stone, by Counsel.

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING WRITTEN AND VERBAL MOTIONS TO DISMISS AND PERMITTING PLAINTIFF TO AMEND COMPLAINT

On September 21, 1954, this cause came on to be heard on the defendants' motion to dismiss the complaint heretofore filed herein and on the defendants' motion made in open [fol. 109] Court that the complaint be dismissed for its failure to state the nature and extent of damages.

On consideration of which it is *Adjudged* and *Ordered* that the motion to dismiss heretofore filed be overruled and it is further *Adjudged* and *Ordered* that the verbal motion that the complaint be dismissed for its failure to state the nature and extent of damages be and the same is hereby overruled and the United States of America, plaintiff herein, is given leave to amend its complaint, so as to state the nature and extent of its actual damages, which amended complaint shall be filed on or before October 15, 1954.

(S.) Sterling Hutcheson, United States District Judge.

September —, 1954.

In United States District Court

Opinion of Court that Motion to Dismiss Should Be Overruled

September 23, 1954

A. C. Epps, Esquire
Mutual Building
Richmond, Virginia
L. S. Parsons, Jr., Esquire
United States Attorney
Richmond, Virginia

Gentlemen:

Re: United States v. Cato Brothers, Incorporated, Wilfred R. Cato, et al.—Richmond Civil #1841—

Upon further consideration of the defendants' motion to dismiss, it is my conclusion that the motion should be over-[fol. 110] ruled. Since the motion contains five separate grounds I feel that for the information of counsel I should give my views briefly with respect to each ground of the motion.

As to grounds 1 and 2, it is my view that the statute of limitations on the plaintiff's claim is six years. The pleadings show that the suit was instituted within six years from the time the cause of action accrued.

As to paragraph 3, as stated on yesterday, it is my view that the Government should be permitted to amend its complaint should it think an amendment necessary.

As to paragraph 4, I do not believe that this is a proper ground for dismissal. However, my ruling should not be taken as an expression on my part as to the merits of the contention made in this paragraph. I believe that this is a matter that can be disposed of in fixing damages should the plaintiff prevail in this case.

As to paragraph 5, I feel that the complaint is sufficient.

Very truly yours, (S.) Sterling Hutcheson, United States District Judge.

In United States District Court

Answer of All Defendants and Counterclaim of Cato Bros., Incorporated

Answer

1. Defendants deny that this court has jurisdiction of any claim of plaintiff by and through Commodity Credit Corporation pursuant to Title 31, Section 232 of the United States Code, but aver that jurisdiction of claims by and against plaintiff through the Commodity Credit Corpo- [fol. 111] ration arises under and only under Title 15, Sections 714 and 714a through o.

2. Defendants admit that Cato Bros., Incorporated is a corporation organized and existing under the laws of the State of Virginia, but aver that the name thereof is misstated in the complaint. Defendants deny that the stock is owned as set out in paragraph 2 of the complaint.

3. Paragraph 3 of the complaint is admitted.

4. Paragraph 4 of the complaint is admitted.

5. Defendant, Magie Stone Dunn, admits that her name was Magie L. Stone, that she is a resident of Emporia and that she was during the year 1948 treasurer of Cato Bros., Incorporated.

6. Paragraph 6 of the complaint is admitted.

7. Defendants neither admit nor deny the allegations of paragraph 7 of the complaint, none of them having any knowledge of the facts therein stated.

8. Defendants admit that Commodity Credit Corporation issued 1948 cotton loan instructions and refer to the instructions themselves for the terms and provisions thereof.

9. Defendants aver that the cotton loan instructions themselves contain the provisions thereof and reference is made thereto for the true and exact provisions thereof.

10. Defendants aver that the notes speak for themselves as to the provisions thereof.

11. Defendants admit entering into a lending agency agreement with Commodity Credit Corporation and aver that the terms of such agreement are the best evidence of the provisions thereof.

[fol. 112] 12. Defendants deny the allegations of paragraph 12 of the complaint and specifically and affirmatively

deny entering into any conspiracy or agreement to defraud plaintiff or a department or officer thereof and specifically and affirmatively deny making any efforts or conspiring to make efforts to obtain the payment or allowance of false and fraudulent claims. These defendants further deny that any of their actions damaged plaintiff in any way.

13. Defendants deny the allegations of paragraph 13 of the complaint.

14. Defendants admit that Cato Bros., Incorporated dealt during the period stated with Commodity Credit Corporation but they deny the making and presenting of any false or fraudulent claims. They further deny that plaintiff was damaged in any way as a result of their actions, or the actions of any one or more of defendants.

15. Defendants are not advised as of the truth or accuracy of the allegations contained in paragraph 15 of the complaint.

16. Defendants deny the allegations of paragraph 16 of the complaint and further specifically deny any intention of wrong doing or the doing of any wrongful acts.

17. Defendants admit that Magie L. Stone acted as an official clerk appointed by the United States Department of Agriculture but deny each and every other allegation of paragraph 17 of the complaint and deny any intention of obtaining or aiding to obtain the payment of false or fraudulent claims and any knowledge that any claims were false or fraudulent.

18. Defendants deny the allegations of paragraph 18 of the complaint.

[fol. 113] 19. Defendants admit, as set out above, that during the period in question, Cato Bros., Incorporated transacted business with Commodity Credit Corporation, but defendants deny each and every allegation of wrong doing. These defendants are not advised as to the status of any employees of the Commodity Credit Corporation.

20. Paragraph 20 of the complaint is denied. Defendants deny that they, or any one of them, is liable to forfeit and pay to the United States the sum of $2,000.00 for each of the alleged notes and that they or any one of them is liable for double the amount of damages sustained by plaintiff and that plaintiff is entitled to recover of them, or any

of them, interest or the costs of this suit as alleged in paragraph 20 of the complaint.

21. The measure of damages is improperly stated and plaintiff should be forced to amend to claim only one penal sum for the alleged error made in the 1948 cotton loan program, which sum said plaintiff is not entitled to recover of defendants, or any of them.

22. The complaint fails to state a claim against defendants, or any of them, upon which relief can be granted.

23. The court is without jurisdiction to hear the case because of the passage of time and plaintiff cannot prosecute its case because barred by the passage of time.

Wherefore defendants pray that judgment be entered for defendants in this action, with costs against the plaintiff.

Counterclaim of Cato Bros., Incorporated

24. Cato Bros., Incorporated states that plaintiff is indebted to it in the principal amount of Eleven hundred fifty dollars and twenty-four cents ($1150.24) together with in-
[fol. 114] terest thereon from January 1, 1953 by reason that said corporation contracted with the Production and Marketing Administration of the United States Department of Agriculture for the sale of eighty-eight hundred and forty-eight pounds of crimson clover seed which the said defendant has since that time withheld from payment and does now refuse to pay.

25. Whereupon Cato Bros., Incorporated moves for judgment against plaintiff for Eleven hundred fifty dollars and twenty-four cents ($1150.24) together with interest thereon and costs.

Cato Bros., Inc., Wilfred R. Cato, William R. Cato, Magie S. Dunn, formerly Magie L. Stone, by counsel.

IN UNITED STATES DISTRICT COURT

AMENDED COMPLAINT

Pursuant to leave of Court, the United States of America, as plaintiff herein, files its amended complaint as follows:

1

The allegations of paragraphs 1 through 20 of the original complaint filed herein are realleged verbatim and incorporated fully herein by reference.

2

A total of 859 bales of cotton was listed by the defendants on the aforedecribed notes and warehouse receipts and these 859 bales of ineligible cotton were sold by the Govern- [fol. 115] ment on April 8, 1953 at a net loss to the Government of $31,598.59.

3

The sum of $129.29 was received by the defendants as interest improperly charged by them while acting as lending agents for the Commodity Credit Corporation.

Wherefore, plaintiff demands judgment against each of the defendants for the sum of $576,000 plus double the sum of $31,598.59 representing the loss to the Government from the sale of the ineligible cotton and double the sum of $129.29 representing the amount of interest improperly charged by the defendants as the aforesaid lending agents.

(S.) L. S. Parsons, Jr., United States Attorney.

(S.) James R. Moore, Assistant United States Attorney.

IN UNITED STATES DISTRICT COURT

MOTION FOR LEAVE TO FILE AMENDED ANSWER

Defendants move the Court for leave to file an amendment to their answer, a copy of which is hereto attached, in

the interest of justice, so that all issues between the parties may be fully litigated in this action.

Cato Bros., Incorporated, Wilfred R. Cato, William R. Cato, Magie S. Dunn, formerly Magie L. Stone, by Counsel.

[fol. 116] IN UNITED STATES DISTRICT COURT

ORDER GRANTING LEAVING TO FILE AMENDED ANSWER —October 19, 1955

This cause came on to be heard on October 19, 1955, on defendants' motion for leave to file an amendment to their answer, and if appearing that justice requires that such leave be given, and the Court being fully advised,

It is Ordered:

1. That defendants be given leave to file their amendment to their answer.

2. That plaintiff reply or otherwise move with respect to the said amended answer within 21 days after service thereof.

(S) Sterling Hutcheson, United States District Judge

IN UNITED STATES DISTRICT COURT

DEFENDANT'S AMENDMENT TO ANSWER

Pursuant to leave granted by order of this Court on October 19, 1955, the defendants amend their answer as follows:

1. Add to paragraph No. the following subparagraphs:

"(a) The defendants have not committed or conspired to commit any of the acts prohibited by Section 5438 of the Revised Statutes of 1878; therefore, no recovery may be had by the plaintiff under Section 3490 of the Revised Statutes of 1878.

"(b) The plaintiff may recover only its actual damages, since the contract between the defendants and the Com-

modity Credit Corporation provides for this as the exclu-
[fol. 117] sive civil remedy for the acts alleged to have been committed by the defendants."

Cato Bros., Incorporated, Wilfred R. Cato, William R. Cato, Magie S. Dunn, formerly Magie L. Stone, By Counsel.

IN UNITED STATES DISTRICT COURT

MOTION BY DEFENDANTS FOR SUMMARY JUDGMENT

Defendants, Cato Brothers, Inc., Wilfred R. Cato, William R. Cato, and Magie L. Stone, move for summary judgment in their behalf, pursuant to Rule 56 of the Federal Rules of Civil Procedure, based upon their amended answer filed herein.

Cato Brothers, Inc., Wilfred R. Cato, William R. Cato, Magie L. Stone, By Counsel.

IN UNITED STATES DISTRICT COURT

OPINION DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT—November 14, 1955

On motion for summary judgment the defendant claims that:

1. This action does not properly come under Section 3490 of the Revised Statutes, which incorporates by refer-
[fol. 118] ence Section 5438, because in this instance there is alleged fraud against a government-owned corporation and not against the government itself as the term implied in 1878, when the statute was incorporated..
2. This being a criminal statute it must be narrowly construed.
3. Pierce v. United States, 314 U. S., 306 (1941) supports this motion.

The legislative history of Section 5438 indicates that under a literal interpretation, a government corporation

would not be within the purview of the original statute as incorporated. The case of United States v. Strang, 254 U. S., 491 (1921) bears out this interpretation. This is based on the reasoning of a "definite interpretation" being given a criminal statute. However, in the case of United States, ex rel Marcus v. Hess, 317 U. S., 537 (1943) the Court held that Section 3490 was remedial and not criminal. The Court in this case held that Section 3490 applied to the representations made to the Public Works Administration, said representations being the basis for advancing money to the Public Works Administration (distributing source to the defendants). The Hess case overruled the Court of Appeals for the Third Circuit which held that Section 3490 did not apply because the defendant dealt with the Public Works Administration and not with the Government. The Court said that it is the source of the money that is controlling and not the distributing sponsor.

The Supreme Court in the Hess case (supra) having decided definitely that Section 3490 is remedial and not criminal, by its failure to mention the Pierce case (supra) indicates that there is a distinction between the Hess and the Pierce cases. It is inescapable that this distinction is whether the statute in question is criminal or remedial. The Pierce case states that Section 32 of the criminal code, [fol. 119] the statute in question, was criminal in nature and that the Tennessee Valley Authority did not come within the original meaning as of 1884, its date of origin. However, two years later the Hess case (supra) says that Section 3490 is remedial in nature, and arrives at a holding which is contrary to that of the Pierce case. Note, too, that even though the Pierce case was not mentioned, the same defense (as upheld in the Pierce case) was overruled by the Supreme Court.

Therefore upon consideration of the above I am of opinion that the Hess case (supra) is controlling and the motion for summary judgment should be denied.

(S) Sterling Hutcheson, United States District Judge.

IN UNITED STATES DISTRICT COURT

LETTER OPINION OF COURT

June 21, 1956

Honorable L. S. Parsons, Jr.
United States Attorney
Richmond, Virginia
Christian, Barton, Parker and Boyd, Esquires
Mutual Building

Richmond Civil No. 1841—

Gentlemen:

Re: United States v. Cato Brothers, Incorporated—
Richmond Civil No. 1841—

[fol. 120] Upon consideration of the record, argument and briefs of counsel, I have reached the following conclusions concerning the above captioned case:

1. All defendants named violated the provisions of the Commodity Credit Corporation Act by filing and causing to be filed with the corporation claims based upon notes covering cotton produced by others;

2. The liability of the defendants is joint and several;

3. The Government may not recover for any loss sustained in the sale of the cotton involved, because:

(a) The cotton was held by the Government for an unreasonably long period of time during which it could have been sold at a profit and loss avoided; and

(b) The Government failed to accept the offer of the defendants to repurchase the cotton at the price paid by the Government and thereby avoid a loss.

4. The liability of the defendants is $2,000.00 forfeiture for each violation of the Act.

5. The forfeitures for which the defendants are liable are $2,000.00 for each of the 31 letters transmitting notes signed by producers of the cotton.

6. The Court has no authority to mitigate or remit any part of the forfeitures provided by the Act.

7. Judgment should be entered in favor of the Government against the defendants jointly in the sum of $62,000.00.

See *United States, ex rel Marcus* v. *Hess,* 317 U. S., 537; *Rex Trailer Company* v. *United States,* 350 U. S., 148; and *United States* v. *Grammis,* 172 Fed. (2d), 507.

It has been my purpose to prepare and file a memorandum in lieu of findings of fact and conclusions of law. [fol. 121] However, due to some unanticipated matters, to do so would cause additional delay. Therefore counsel are requested to submit drafts of proposed findings of fact and conclusions of law, and judgment order, in accordance with the foregoing.

Very truly yours, (S) Sterling Hutcheson, United States District Judge.

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—July 31, 1956

The Court having heard the evidence in the above case finds as a fact:

1. The defendant, Cato Bros., Incorporated, is a corporation organized and existing under the laws of the State of Virginia doing business in Emporia, Virginia.

2. The defendant, Wilfred R. Cato, is a resident of Emporia, Virginia, and was at all times mentioned herein President and a Director of Cato Bros., Incorporated.

3. The Defendant, William R. Cato, is a resident of Emporia, Virginia, and was at all times mentioned herein Secretary and a Director of Cato Bros., Incorporated.

4. The defendant, Magie L. Dunn (Nee: Stone), is a resident of Emporia, Virginia, and was during the year 1948, Treasurer of Cato Bros., Incorporated.

5. None of the defendants mentioned herein is, nor at any time mentioned herein was, in the military or naval service of the United States or in the militia called into or actually employed in the service of the United States.

[fol. 122] 6. The Commodity Credit Corporation is a

body corporate whose entire capital stock is subscribed by the United States of America, and it is an agency and instrumentality of the United States.

7. On August 3, 1948, the Commodity Credit Corporation and the defendant, Cato Bros., Incorporated, entered into a Lending Agency Agreemnt, under which the defendant, Cato Bros., Incorporated, was authorized to make loans to producers of 1948 crop cotton in accordance with the provisions of the said agreement.

8. During the year 1948, the defendants, Cato Bros., Incorporated, Wilfred R. Cato, William R. Cato and Magie L. Dunn (Nee: Stone), did submit to the Commodity Credit Corporation, fifty-five (55) letters, transmitting a total of One Thousand One Hundred Seventy-Six (1,176) notes representing loans made pursuant to the Lending Agency Agreement.

9. The defendants, Cato Bros., Incorporated, Wilfred R. Cato, William R. Cato, and Magie L. Dunn (Nee: Stone), transmitted to the Commodity Credit Corporation in thirty (30) of the aforementioned letters of transmittal a total of Seven Hundred Forty-eight (748) notes, in each of which letters there was at least one note covering cotton not actually produced by the person who signed the note as producer, and thus made and caused to be presented for payment to persons in the civil service of the United States, thirty (30) claims upon the Commodity Credit Corporation knowing the said claims to be false.

10. The cotton represented by the aforesaid improper notes was held by the Commodity Credit Corporation for an unreasonably long time, during which time it could have disposed of the said cotton at a profit.

[fol. 123] 11. The Commodity Credit Corporation failed to accept the offer of the defendants to repurchase the cotton at the price paid for the cotton by the said Corporation.

12. The defendant, Cato Bros., Incorporated, contracted with the Production and Marketing Administration of the United States Department of Agriculture for the sale of Eight Thousand Eight Hundred Forty-eight (8,848) pounds of crimson clover seed, for which said defendants have not been paid, and as a result of which the United States of America is indebted to the defendant, Cato Bros., Incorporated, in the principal amount of One Thousand One Hun-

dred Fifty and 24/100 Dollars ($1,150.24) together with interest thereon from January 1, 1953, at 6% per annum.

The Court concludes as a matter of law:

1. The defendants, Cato Bros., Incorporated, Wilfred R. Cato, William R. Cato and Magie L. Dunn (Nee: Stone), violated the provisions of Section 3490 of the Revised Statutes of 1878, in that they made and caused to be presented for payment to persons in the civil service of the United States thirty (30) claims upon the United States, knowing the said claims to be false.

2. A claim upon the Commodity Credit Corporation is a claim upon the United States within the meaning of Section 3490 of the Revised Statutes of 1878.

3. The defendants, Cato Bros., Incorporated, Wilfred R. Cato, William R. Cato and Magie L. Dunn (Nee: Stone), are jointly and severally liable to the United States of America in the amount of a Two Thousand Dollar ($2,000.00) forfeiture for each of the aforementioned thirty (30) letters of transmittal submitted to the Commodity Credit Corporation.

[fol. 124] 4. The plaintiff has not suffered any legally recoverable damages due to the actions of the defendants.

5. The recovery by plaintiff of Sixty Thousand Dollars ($60,000.00) in forfeitures is Constitutional as a civil remedy, even though plaintiff has not suffered any legally recoverable damages due to the actions of the defendants.

6. The defendant, Cato Bros., Incorporated, is entitled to judgment against the plaintiff in the amount of One Thousand One Hundred Fifty and 24/100 Dollars ($1,150.24) with interest thereon from January 1, 1953 at 6% per annum.

(S) Sterling Hutcheson, United States District Judge.

IN UNITED STATES DISTRICT COURT

FINAL JUDGMENT ORDER—July 31, 1956

The above matter having come on for trial and the evidence having been heard and the Court having found the defendants, Cato Bros., Incorporated, Wilfred R. Cato,

William R. Cato, and Magie L. Dunn (nee: Magie L. Stone), guilty of filing false claims upon the United States of America in violation of Section 3490 of the Revised Statute of 1878, and the Court having found that the United States of America is indebted to Cato Bros., Incorporated, in the amount of $1,150.24 with interest thereon at 6% per annum from January 1, 1953;

It is accordingly *Adjudged, Ordered* and *Decreed* that the defendants pay to the United States of America the sum of $60,000 or $2,000 forfeiture on each of the 30 letters of transmittal mentioned in the Findings of Fact herein, [fol. 125] and

It is further *Adjudged, Ordered* and *Decreed* that the United States of America do pay to Cato Bros., Incorporated, the sum of $1,150.24 with interest thereon at the rate of 6% per annum from January 1, 1953.

(S) Sterling Hutcheson, United States District Judge.

[fol. 126] IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7333

CATO BROS., INCORPORATED, WILFRED R. CATO, WILLIAM R. CATO, and Magie L. Dunn (nee: Magie L. Stone), Appellants,

versus

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond

DOCKET ENTRIES

October 25, 1956, record on appeal filed and appeal docketed.

October 25, 1956, original exhibits received from the Clerk of the District Court.

October 27, 1956, appearance of A. C. Epps and Charles W. Laughlin entered for the appellants.

October 30, 1956, appearance of A. C. Epps entered for the appellants.

November 8, 1956, appearance of Melvin Richter and William W. Ross, Attorneys, Department of Justice, entered for the appellee.

December 18, 1956, brief and appendix for appellants filed.

January 7, 1957, stipulation as to appellee's brief filed.

January 7, 1957, brief for appellee filed.

January 9, 1957, stipulation as to reply brief filed.

January 10, 1957, reply brief for appellants filed.

January 14, 1957, motion of appellants to change time of argument filed.

[fol. 127] January 14, 1957, motion of appellants to change time of argument presented in open court and denied.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—January 14, 1957. (Omitted in Printing)

[fols. 128-139] OPINION—Omitted. Printed side page 12 supra

[fol. 140] IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7333

CATO BROS., INCORPORATED, WILFRED R. CATO, WILLIAM R. CATO, and Magie L. Dunn (nee: Magie L. Stone), Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Eastern District of Virginia

JUDGMENT—Filed and Entered February 28, 1957

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed in so far as it gives judgment against defendants; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Virginia, at Richmond, for further proceedings in accordance with the opinion of the Court filed herein.

John J. Parker, Chief Judge, Fourth Circuit. Morris A. Soper, United States Circuit Judge. Albert V. Bryan, United States District Judge.

April 2, 1957, mandate issued and transmitted to the Clerk of the United States District Court at Richmond, [fol. 141] Virginia.

April 8, 1957, record on appeal and original exhibits returned to the Clerk of the United States District Court at Richmond, Virginia.

[fol. 142] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 143] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1957

No. 146

UNITED STATES OF AMERICA, Petitioner,

vs.

HOWARD A. MCNINCH, d/b/a THE HOME COMFORT CO.; ROSALIE MCNINCH and GARIS P. ZEIGLER, et al.

ORDER ALLOWING CERTIORARI—October 14, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted, and the case is transferred to the summary calendar.

And it is futher ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE 1957 450796 850